87-1795

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RAINBOW TOURS, INC. D/B/A
RAINBOW COACHES,

PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the practice and procedures of the National Labor Relations Board in backpay proceedings deprive a party with the burden of proof of access to material evidence in violation of the National Labor Relations Act and the Fifth Amendment of the United States Constitution?
2. Whetner a Hawaii statute which prohibits the National Labor Relations Board from obtaining state unemployment insurance records of backpay claimants, is preempted by the National Labor Relations Act (29 USC §161(1)) which empowers the Board to subpoena relevant information in the administration of the Act?

3. Where a backpay claimant knowingly fails to disclose interim earnings on his federal income tax return and the Board deems his conduct "reprehensible", does the Board violate the public policy objectives of the NLRA and the Internal Revenue Code, 26 USC §6001 by awarding backpay?

4. Where claimants are concededly offered reinstatement to their former positions but would forfeit seniority, must back pay be tolled pursuant to the principles set forth in Ford Motor Co. v. EEOC, 458 US 219 (1982)?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner: Rainbow Tours, Inc. dba Rainbow Coaches.[1/]

Respondent: National Labor Relations Board.[2/] Hawaii

1/ Rainbow Tours, Inc. has no parent corporation, subsidiaries or affiliates.

2/ Although technically not parties to the proceedings below, except Ronald Sai, the backpay claimants are as follows:

Simeon Agao, Jr.
Michael Akamine
Miles Fonseca
Yukio Iho
Lane Kaaiai
Eric Kama
Ralph Kaui
James Louis
Ronald Sai
Henry Sanford
Paul Iwata

Teamsters and Allied Workers,
Local 996, International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America, Ronald Sai, an
individual.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. THE UNDERLYING UNFAIR LABOR PRACTICE CASE	4
B. THE BACKPAY PROCEEDINGS	6
1. Refusal To Allow Discovery	6
2. Backpay Granted Despite "Represensible" Failure To Report Interim Earnings On Federal Tax Returns	10
REASONS FOR GRANTING THE WRIT ...	11
1. This Case Presents A Clear View Of How NLRB Procedures Prevent Discovery And Introduction Of Material Evidence	13

Page

2. The Subpoenas Were Revoked On Erroneous Legal Premises Which, If Upheld, Will Serve To Undermine Due Process In Future Backpay Proceedings 15

3. The "Reprehensible" Failure to Report Interim Earnings in Tax Returns Violates Public Policies Underpinning The Backpay Remedy and The Internal Revenue Code 18

4. Failure to Toll Backpay Contravenes Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	Page
Clayton-Willard Sales, 126 NLRB 1325 (1968)	19
Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)	20, 21
General Electric, Inc. v. NLRB, 341 F.2d 367 (9th Cir. 1965)	16
In Re Grand Jury Subpoena (Conn. Sav. Bank), 481 F.Supp. 833 (D. Conn. 1979)	28
In Re Grand Jury Subpoena For N.Y. State Income Tax Returns, 468 F.Supp. 575 (N.D. N.Y. 1979)	18
In Re Request For Judicial Assistance, 669 F.Supp. 403 (S.D. Fla. 1987)	18
Machinists v. Wisc. Emp. Rel. Comm., 427 U.S. 132 (1976) ..	17
NLRB v. Indiana & Michigan Electric Company, 318 U.S. 9 (1942)	15
NLRB v. Ironworkers, 466 U.S. 720 (1984)	13
NLRB v. Rainbow Tours, 628 F.2d 1357 (9th Cir. 1980) ...	6

Cases — Page

NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) 13

Rainbow Tours, Inc., 241 NLRB 589 (1979) 4

Rainbow Tours, Inc., 280 NLRB No. 17 (1986) 11

Rainbow Tours v. Hawaii Joint Council, 704 F.2d 1443 (9th Cir. 1983) 5

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) . 17

Southern S.S. Co. v. NLRB, 316 U.S. 31 (1941) 20

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 20

United States Constitution

Amendment V 3

Article 6, Clause 2 3

Federal Statutes

26 U.S.C. §6001 20

28 U.S.C §1254(1) 2

28 U.S.C §2101(c) 2

Page

29 U.S.C. §160(f) 11

29 U.S.C. §161(1) 3, 16, 17

Code of Federal Regulations

29 C.F.R. §102.31(b) 16

29 CFR §102.66(C) 3

Hawaii Revised Statutes

H.R.S. §383-30 ..... 3, 8

H.R.S. §383-95 ..... 3, 9

Hawaii Administrative Rules, Department of Labor and Industrial Relations

Rule 12-5-55 ..... 3, 8

Miscellaneous

Supreme Court Rules 20.2 and 20.4 2

OPINIONS BELOW

The memorandum opinion of the Court of Appeals (No. 86-7630) is unpublished and is reproduced in the Appendix at App.-1-22. The NLRB decisions concerning backpay are reported at 266 NLRB 585 (1983) [partial summary judgment] and 280 NLRB No. 17 (1986) and are reproduced in the Appendix at App.-23-33 and App. 34-363.

The NLRB decision is the underlying unfair labor practice case is reported at 241 NLRB 589 (1979) and is reproduced in the Appendix at App. 364-454. That decision was enforced by the Ninth Circuit without opinion, 628 F.2d 1357 (9th Cir. 1980). App. 455.

JURISDICTION

The Court of Appeals' Memorandum Opinion was filed on December 4, 1987. App. 1. The Court of Appeals denied Rainbow Tours, Inc.'s (hereinafter Rainbow) petition for rehearing and suggestion for rehearing en banc on February 2, 1988. App. 479-480. Judgment was entered on February 18, 1988. App. 456-478. Rainbow has filed this petition for certiorari within 90 days from the date of denial of the petition for rehearing as required by 28 USC §2101(c) and Supreme Court Rules 20.2 and 20.4. This Court has jurisdiction under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional Provisions, Statutes and Regulations are Reproduced in the Appendix at App. 505-537. They are as follows: United States Constitution Amendment V App. 505; Article 6, Clause 2 App. 505; National Labor Relations Act, 29 U.S.C. §161(1) App. 505-511; 29 CFR §102.66(C) App. 508-511; Hawaii Revised Statutes H.R.S. §383-95 App. 511-515; H.R.S. §383-30 App. 515-531; Admin. Rule 12-5-55 App. 531-537.

STATEMENT OF THE CASE

A. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

Rainbow Tours, Inc. operates tour buses on the island of Oahu, Hawaii.

On January 30, 1977, employees of Hawaiian Scenic Tours, a Teamster-organized competitor of Rainbow, commenced mass picketing outside the premises rented by Rainbow, a struggling bus operation at the time. Upon reporting for work at dusk, some of Rainbow's employees did not cross the picket line and one who did later abandoned his work due to fear. Rainbow Tours, Inc., 241 NLRB 589, 592-593 (1979) App. 392-396. The NLRB ruled that Rainbow violated Sections 8(a)(1) and (3) of the NLRA by discharging ten employees for

refusing to cross the picket line. App. 364-371.[3/] Five of the dischargees were full-time tour bus drivers and five were part-time tour bus drivers. 241 NLRB at 595. App. 413-414.

The Board found that the Claimants were discharged but offered reinstatement during a meeting on January 31, 1977. A condition of reinstatement, however, was loss of seniority. The Claimants rejected this offer. 241 NLRB 589 at 593-594 App. 402-404.

3/ In a subsequent, related civil action, the picketing was found to be a tortious interference with the employer's business. Rainbow Tours v. Hawaii Joint Council, 704 F.2d 1443, 1447 (9th Cir. 1983).

The Ninth Circuit Court of Appeals enforced the Board's unfair labor practice decision and order without a published opinion. NLRB v. Rainbow Tours, 628 F.2d 1357 (9th Cir. 1980). App. 455.

B. THE BACKPAY PROCEEDINGS

1. Refusal To Allow Discovery

The backpay Claimants were discharged in January, 1977. The Board violated its internal policies by failing to contact the Claimants with forms to document interim earnings and mitigation efforts until 1982. The hearing officer found:

> The claimants were discharged at the end of January 1977. The Board, contrary to recommended but not required practice, failed to solicit information from the discriminatees until 1982. This

> delay understandably made it difficult for the individual discriminatees to list with specificity and accuracy the details of their job search and led to last minute disclosures and recollections after face to face interviews and discussions.

ALJ Backpay Dec. p. 8 App. 70.

Many forms belatedly sent to the claimants to document mitigation efforts were returned blank. ALJ Dec. p. 69 App. 302, Resp. Exhs. C-4, F4, App. 481-504.

With the burden of proving failure to report interim earnings and failure to apply for suitable work, Rainbow petitioned the Board to allow prehearing depositions of the claimants. The petition was denied without explanation. 266 NLRB 585, 586 n. 5 (1983) App. 33.

Thereafter, Rainbow secured subpoenas to obtain documentation

regarding the claimant's availability for work, job searches, and interim earnings. Rainbow subpoenaed the State of Hawaii Department of Industrial Relations for unemployment insurance records of the claimants.[4/] The unemployment insurance subpoenas were revoked pursuant to the Board's interpretation of a state privacy statute which regulates disclosure of unemployment

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4/ The Hawaii Employment Security statute and regulations require unemployment insurance benefit recipients to apply for suitable work or forfeit benefits. The statute also provides for benefit cutoff if claimants leave employment without good cause or are terminated for misconduct connected with work. Said records would thus serve to document job search efforts and/or failure to mitigate damages. HRS 383-30(3), "Disqualification of Benefits" App. 515-531; Admn. Rule 12-5-55, Failure to Apply for Work. App. 531-537

insurance documents, HRS §383-95, App. 511-515. ALJ Dec. pp. 10-12 App. 75-81, Court of Appeals Memorandum Opinion, p. 5 App. 9-11.

Rainbow had also subpoenaed Claimant bank records for purposes of impeachment through undisclosed interim earnings. For example, a record indicating regular deposits in a savings or checking account during periods of asserted unemployment may reveal hidden interim earnings. The hearing officer revoked these subpoenas on grounds that Rainbow had failed to establish the "relevancy" of the subpoenaed documents which Rainbow was never allowed to see. ALJ Decision, p. 16 App. 91-95. The Board denied special appeal of the revocations during the trial, advising

Rainbow that it could renew its contentions in exceptions to the hearing officer's decision. App. 33a-33b. Rainbow did so, but the Board, three years later, never ruled on the point. The Court of Appeals upheld the hearing officer's reasoning concerning the subpoena revocations. Memorandum Opinion, pp. 5-6 App. 11-13.

2. Backpay Granted Despite "Represensible" Failure To Report Interim Earnings On Federal Tax Returns

The largest backpay award went to part-time driver, Miles Fonseca (over $36,000, including interest). Fonseca admitted that he failed to report interim earnings on his tax returns. The Board deemed his conduct "reprehensible" yet awarded Fonseca

backpay for the year in which the fraud occurred.[5/]

The Board summarily affirmed the ALJ's backpay decision. Rainbow Tours, Inc., 280 NLRB No. 17 (1986) App. 34-37. The total backpay award exceeds $200,000, including interest.

Ninth Circuit Appellate jurisdiction was grounded on 29 U.S.C. §160(f).

REASONS FOR GRANTING THE WRIT

There are hundreds of NLRB backpay proceedings annually. Between

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5/ "Fonseca's admission that he did not report some of the interim earnings he received on his tax returns is reprehensible; however, it is not the type of concealment that would toll backpay." [ALJ Dec. p. 46, App. 210]

January, 1986 and February 1988, 316 backpay specifications were filed with the Board. Source: 2/25/88 Board reply to Rainbow FOIA request.

Supreme Court review of the issues presented will resolve important questions of law and procedure in backpay proceedings. The Board's current practices, as reflected in its decision and the decision of the Court of Appeals, moreover, appears to conflict in principle with decisions of this Court.

1. This Case Presents A Clear View Of How NLRB Procedures Prevent Discovery And Introduction Of Material Evidence

The Board's backpay procedures deny Respondent's due process.[6/]

The respondent has the burden of proving claimants concealed earnings or failed to make reasonable efforts to gain and retain employment. See ALJ Backpay Decision p. 5 App. 55:

6/ In NLRB v. Ironworkers, 466 U.S. 720 (1984) the Supreme Court reaffirmed the rule in NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) that inordinate delay by the Board in issuing a backpay specification does not, standing alone, deny a company due process. The Court noted, however, that it did not "... foreclose challenges that might be raised to the conduct or outcome of the supplemental backpay proceedings." 466 U.S. at 726.

> That General Counsel accumulates information does not indicate any assumption of an obligation to show whether the discriminatees took reasonable and sufficient steps to mitigate backpay. The employer has the burden of proving the affirmative defense of failure to mitigate.

The five year hiatus in communication between the claimants and the NLRB resulted in no contemporaneous documentation of interim earnings and mitigation efforts. Denial of pre-hearing discovery and revocation of subpoenas demanding unemployment insurance and bank records left Rainbow to rebut or impeach the bare factual assertions of the claimants without available information that would logically test the truth of those assertions.

Due process requires that respondents have a viable opportunity

to test witness credibility with potentially impeaching information. See, NLRB v. Indiana & Michigan Electric Company, 318 U.S. 9 at 28 (1942):

> Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

2. The Subpoenas Were Revoked On Erroneous Legal Premises Which, If Upheld, Will Serve To Undermine Due Process In Future Backpay Proceedings

The Board ignored precedent and the express language of the NLRA when it required Rainbow to establish the relevancy of subpoenaed claimant bank records without being allowed to see these records. The NLRA requires that

subpoenaed information must simply "relate to any matter ... in question in the proceedings ... ." 29 U.S.C. §161(1). App. 505-506. See, also, 29 C.F.R. §102.31(b) (1988) App. 508-510.

Requiring a respondent to establish the legal relevance of subpoenaed documents without being allowed to see them conflicts also with General Electric, Inc. v. NLRB, 341 F.2d 367, 376 (9th Cir. 1965) relied upon by the Ninth Circuit in affirming the Board's Order. There, the court noted the difficulty encountered in demonstrating relevancy without seeing the documents and ruled that relevancy may be described in the most general terms for purposes of defeating a motion to revoke a subpoena.

The Court upheld the Board's revocation of subpoenas to the state unemployment insurance office on the basis of statutory privilege. [ALJ decision pp. 10-12, App. 75-81 Ninth Circuit memorandum opinion p. 5. App. 9-11] The state statutory privilege recognized by the Board and the Court is, we submit, preempted by the NLRA. 29 U.S.C. §161 which grants the Board subpoena power to administer the NLRA preempts the Hawaii statute which purportedly prohibits disclosure of information in Board proceedings. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959); Machinists v. Wisc. Emp. Rel. Comm., 427 U.S. 132 at 136-137 (1976).

Courts under analogous circumstances have consistently held

that federal subpoena power preempts state privacy statutes. See, In Re Request For Judicial Assistance, 669 F.Supp. 403, 407 (S.D. Fla. 1987); In Re Grand Jury Subpoena (Conn. Sav. Bank), 481 F.Supp. 833 (D. Conn. 1979); In Re Grand Jury Subpoena For N.Y. State Income Tax Returns; 468 F.Supp. 575 (N.D. N.Y. 1979); appeal dismissed 607 F.2d 566 (2d Cir. 1979).

3. The "Reprehensible" Failure to Report Interim Earnings in Tax Returns Violates Public Policies Underpinning The Backpay Remedy and The Internal Revenue Code

Granting backpay to a claimant who admittedly failed to report interim earnings on his tax returns violated the policies of both the NLRA and the Internal Revenue Code.

A backpay award, although compensating an employee for unlawful conduct, is not a penalty, nor a private award for personal damages, but a sum given in the public interest and in vindication of public rights. Clayton-Willard Sales, 126 NLRB 1325-1326 (1968).

The Board's holding is inconsistent with the policies of the National Labor Relations Act. Awarding backpay to a claimant who defrauds the government hardly operates as a vindication of public rights. The decision also invites claimants to conceal interim earnings since they will not be sanctioned for failure to report them on their income tax reporting forms.

The decision also subverts the public policy behind truthful income reporting required by the Internal Revenue Code. 26 U.S.C. §6001.

The Supreme Court has twice held that the Board must be cognizant of public policies beyond those embodied in the Labor Act in fashioning remedies. See, Sure-Tan, Inc. v. NLRB, 467 U.S. 883 at 903-904 (1984); Southern S.S. Co. v. NLRB, 316 U.S. 31 at 47 (1941).

4. Failure to Toll Backpay Contravenes Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)

The Board found that the claimants were offered reinstatement on January 31, 1977, but that they would

lose seniority. 241 NLRB at 593-594 App. 402-404. The reinstatement offer should have tolled backpay pursuant to Ford, supra.

In Ford, a Title VII case, the Court held that backpay is tolled on an unconditional offer of reinstatement without retroactive seniority.[7/] The Court saw the anomaly if a claimant is required to accept similar employment by an alternative employer without seniority to mitigate damages but may reject employment with the respondent employer unless accompanied by an

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7/ The Court found that the backpay provision of Title VII was "expressly modeled" on the analogous, remedial provisions of the NLRA. 458 U.S. at 226, n. 8.

offer of retroactive seniority. 458 U.S. at 233 (n. 19). The Court reasoned that it was wrong to require an employer to, in effect, insure the Claimant against the risks that the employer might win at trial. 458 U.S. at 238, 240 (n.29). The Court noted that if the employee prevails, benefits he would have received pursuant to retroactive seniority can be calculated in backpay proceedings. 458 U.S. at 238-239.

The court erred in failing to apply these principles to the present case.

CONCLUSION

A grant of certiorari will present the Court with an important opportunity, on a full record, to

provide much needed guidance to the Board and practitioners with regard to procedural due process in backpay proceedings. Certiorari would also allow scrutiny of findings which appear in direct conflict with decisions of this Court concerning the nature of the backpay remedy, preemption and liability cutoff.

The petition should therefore be granted.

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APPENDIX TABLE OF CONTENTS

	Page
Rainbow Tours, Inc. d/b/a/ Rainbow Coaches (9th Cir. No. 86-7630, 1988)	1
Rainbow Coaches, 266 NLRB 585 (1983)	23
NLRB Order Denying Special Appeal of Subpoena Revocations	33a
Rainbow Tours, Inc., 280 NLRB No. 17 (1986)	34
Rainbow Tours, Inc., 241 NLRB 589 (1979)	364
NLRB v. Rainbow Tours, Inc., 628 F.2d 1357 (9th Cir. 1980)	455
Judgment	456
Order Denying Petition For Rehearing And Suggestion For Rehearing En Banc	479
Respondents Exhibits, C-4, F-4	481
U.S. Constitution Amendment V	505
U.S. Constitution Article 6, Clause 2	505

Page

National Labor Relations Act
29 U.S.C. §161(1) 505

29 C.F.R. §102.66(C) 508

Haw. Rev. Stat. H.R.S. §383-95 .. 511

Haw. Rev. Stat. H.R.S. §383-30 .. 515

Haw. Adm. Rule 12-5-55 531

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAINBOW TOURS, INC. d/b/a RAINBOW COACHES, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD Respondent.	No. 86-7630 NLRB# 37-CA-1341 MEMORANDUM*/ Filed Dec. 4, 1987 Cathy A. Catterson, Clerk U.S. Court of Appeals

Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

Argued and Submitted November 5, 1987 - Honolulu, Hawaii Before: BROWNING, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

We review an order of the National Labor Relations Board awarding backpay

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*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

to 10 former employees of Rainbow Tours. In a prior decision, the Board found that Rainbow Tours violated the National Labor Relations Act by discharging the employees in 1977 because they refused to cross a lawful picket line. Rainbow Tours, Inc., 241 NLRB 589 (1979), enforced, NLRB v. Rainbow Tours, Inc., 628 F.2d 1357 (9th Cir. 1980).

In September 1982, the NLRB general counsel issued a backpay specification which alleged that ten of the discriminatees were entitled to backpay totaling approximately $148,000 plus interest. Rainbow denied most of the allegations and raised several affirmative defenses.

Administrative Law Judge Wieder held hearings regarding the disputed

gross backpay and interim earnings of the discriminatees. During the hearings, the ALJ granted petitions submitted by governmental agencies and banks to revoke subpoenas, and denied Rainbow's request for prehearing discovery. The ALJ recommended that Rainbow be ordered to pay the discriminatees specified amounts totaling approximately $98,000 plus interest.

In a supplemental decision and order the Board adopted the recommended order. The Board's order did not contain specific findings of fact or reasoning for the decision.

Rainbow seeks review of the NLRB's order, asserting that (1) the Board's failure to make specific findings of fact and articulate a rationale for

its decision is an abuse of discretion, arbitrary, and capricious; (2) Rainbow was denied due process during the backpay proceeding because it was denied prehearing discovery and its subpoenas were revoked; and (3) there is a lack of substantial evidence to support the award of backpay.

We deny the Petition for Review and enforce the Order subject to the modification indicated.

Discussion

I. Board's Adoption of the Recommended Decision

Rainbow challenges the Board's adoption of the ALJ's recommended supplemental decision in lieu of specific written findings of fact and reasons for decision as an abuse of discretion, arbitrary, and capricious.

Section 10(c) of the NLRA requires the Board to make findings of fact, but does not require explicitly that it state its reasons for acting. NLRB v. Pacific Southwest Airlines, 550 F.2d 1148, 1152 (9th Cir. 1977); 29 U.S.C. §160(c) (1982). We have upheld previously a Board order which adopted an ALJ's recommended decision because the recommendation contained a clear and detailed explanation of reasons for the decision. NLRB v. Davis, 642 F.2d 350, 355 (9th Cir. 1981). Davis is in line with other circuits that permit the Board to adopt a sufficiently detailed decision of an ALJ without restating the findings and reasoning. See ARTRA Group, Inc. v. NLRB, 730 F.2d 586, 590 (10th Cir. 1984); NLRB v. Permanent Label Corp.,

657 F.2d 512, 519 (3d Cir. 1981), cert. denied, 455 U.S. 940 (1982).

Here, the Board adopted completely the ALJ's recommendation which contains the factual specificity and rationale required of Board orders. The recommended decision contains a detailed analysis of Rainbow's exceptions and reasons for the ALJ's recommendations. The basis for the factual findings and conclusions are expressed adequately for us to determine the propriety of the Board's action. The Board did not abuse its discretion.

II. Due Process

During the backpay hearings, Rainbow's request for prehearing discovery was denied, and subpoenas it

issued were revoked. Rainbow contends that it was denied due process.

A. Prehearing Discovery

Parties to a quasi-judicial proceeding are not entitled to discovery as a matter of constitutional right. See NLRB v. Valley Mold Co., 530 F. 2d 693, 695 (6th Cir.), cert. denied, 429 U.S. 824 (1976); NLRB v. Interboro Contractors, 432 F.2d 854, 857-58 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). Denial of an application to take depositions does not constitute a denial of due process, absent an abuse of discretion. See Electromec Design & Dev. Co., Inc. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969). A reviewing court will find an abuse of discretion only when the appealing party

demonstrates that it has been clearly prejudiced by the ALJ's ruling. See id. at 635.

The availability of prehearing discovery at a backpay proceeding is governed by the Board's own rules since there is no specific provision in the NLRA for discovery. See id. Board proceedings conducted before an ALJ are governed by 29 C.F.R. §102.30(a) (1986), which provides that testimony may be taken by deposition at the discretion of the ALJ upon a showing of good cause.

Rainbow has failed to specify the information it sought through discovery or the prejudicial effect of being denied discovery. The Board did not abuse its discretion in denying

discovery where, as here, there was no showing of good cause.

B. Subpoenas

Board decisions denying enforcement of a subpoena are discretionary, see NLRB v. Adrian Belt Co., 578 F.2d 1304, 1310 (9th Cir. 1978), and are reviewed for an abuse of discretion. Board regulations provide that a subpoena may be revoked if for a "reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. §102.31(b) (1986). In exercising its discretion, the Board must comply as far as practical with the Federal Rules of Evidence. General Eng'g, Inc. v. NLRB, 341 F.2d 367, 374 (9th Cir. 1965); 29 U.S.C. §160(b) (1982). Revocations may be based upon a valid evidentiary

objection to the material sought under the subpoena. NLRB v. Seine & Line Fishermen's Union, 374 F.2d 974, 980 (9th Cir.), cert. denied, 389 U.S. 913 (1967).

Rainbow subpoenaed the Hawaii Department of Labor and Industrial Relations (DLIR) for reports of weekly job search efforts filed by the discriminatees. Hawaii's petition for revocation was granted on the basis of a statutory privilege covering information reported to the DLIR.

A claim of statutory privilege is a valid basis for the Board to revoke a subpoena. NLRB v. Adrian Belt Co., 578 F.2d 1304, 1310 (9th Cir. 1978). Here, the ALJ did not abuse her discretion in light of the finding that the intent of the Hawaii

legislature was to keep employment records confidential to encourage truthful reporting. We are not dissuaded from our conclusion by Rainbow's unsubstantiated assertion that revocation of the subpoenas was prejudicial.

Rainbow also subpoenaed two banks for records of the discriminatees' accounts to look for signs of interim employment. The ALJ refused initially to order the banks to comply, but offered to reconsider if Rainbow could show relevance and materiality. The ALJ found that Rainbow never established relevancy under Rule 401 of the Federal Rules of Evidence because there was no description of the accounts or a showing as to the nature of them. Rainbow's failure to

establish relevancy is sufficient justification for revocation of the subpoenas. See General Eng'g, 341 F.2d at 372-73.

Rainbow alleges that access to the bank records was crucial because several claimants, for whom they had no records, fraudulently concealed interim earnings. Rainbow has not demonstrated that it could not obtain records of the discriminatees' bank accounts by other means, such as enforcing subpoenas which were served on the discriminatees and called for production of their bank records. Without showing that it could not obtain those records by other means, Rainbow has not established that it was denied due process. See NLRB v. Heath Tec Division/San Francisco, 566

F.2d 1367, 1372 (9th Cir.), cert. denied, 439 U.S. 832 (1978).

The Board did not abuse its discretion in refusing to enforce the subpoenas. Rainbow's argument based upon a violation of 29 C.F.R. §102.31(b) is without merit.

III. Board's Backpay Order

The heart of Rainbow's petition is a challenge to the Board's backpay order. Rainbow contests the formula selected to calculate gross backpay, as well as the computation of interim earnings.

To the extent that a Board decision rests of findings of fact, reviewing courts must defer to the decision if it is supported by substantial evidence on the record as a whole. NLRB v. Mercy Peninsula

Ambulance Serv., Inc., 589 F.2d 1014, 1018 (9th Cir. 1979); 29 U.S.C. 160(e) (1982); see Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

A. Gross Backpay Formula

To achieve the goal of making discriminatees whole, see NLRB v. Dodson's Market, Inc., 553 F. 2d 617, 620 (9th Cir. 1977), gross backpay should reflect the probable earnings of a discriminatee during the backpay period. Here, the Board adopted Formula 2, NLRB Case Handling Manual, pt. 3, §10540, as proposed by the general counsel.

Rainbow argues that this formula fails to account for the seasonal nature of its business, and that the representative period is unreasonable. The ALJ recognized that

this formula might not be appropriate for seasonal businesses, but concluded that Rainbow had not established its business's seasonality. Furthermore, the formula's 12-week base period was not shown to be aberrational.

The ALJ concluded that general counsel had shown that his formula was reasonable, and that Rainbow had failed to "set forth an alternative formula or furnish appropriate supporting figures for computing the amounts owed with sufficient particularity and reliability" to justify its use.

The formula adopted by the Board is supported by the record. Although the formula may not produce the exact figure that the discriminatees would have earned, the Board "is only

required to employ a formula reasonably designed to produce approximate awards due." Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161, 1177 n.28 (5th Cir. 1969). Uncertainties, such as the impact of fluctuations in Rainbow's business and the impact of the discriminatees' seniority, should properly be assessed against Rainbow as the wrongdoer. See NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 572-73 (5th Cir. 1966).

B. Interim Earnings and Mitigation of Losses

Rainbow challenges also the findings of the interim earnings charged to each discriminatee, the reasonableness of the discriminatees' efforts to mitigate losses, and a lack of intentional concealment of interim earnings.

Once general counsel has met his burden to establish the gross amount of backpay, the employer must prove circumstances which would limit its liability. NLRB v. United Bhd. of Carpenters, 531 F.2d 424, 426 (9th Cir. 1976). Employers may reduce backpay liability by proving the discriminatees' interim earnings, see Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941), an unjustified refusal to take a substantially equivalent position, see Mercy Peninsula Ambulance, 589 F.2d at 1017, or neglect in making reasonable efforts to find comparable employment, see M Restaurants v. NLRB, 621 F.2d 336, 337 (9th Cir. 1980).

Rainbow presented a patchwork of allegations intended apparently to

show a lack of substantial evidence to support the Board's findings. We are not persuaded. For the most part, Rainbow's challenges are to the credibility of the discriminatees' testimony. We defer to the Board's credibility findings unless they are " inherently incredible or patently unreasonable," see NLRB v. Anthony Co., 557 F.2d 692, 695 (9th Cir. 1977), and conclude that the findings here are reasonable and supported by substantial evidence.

Rainbow argues that the discriminatees' backpay must be tolled by its offer of employment with reduced seniority since the offer constitutes substantially equivalent employment. We do not reach this argument. There is no finding that

Rainbow offered to reinstate the discriminatees to substantially equivalent positions, notwithstanding the question of reduced seniority. The Board stated that the nature and extent of any offer of reinstatement was "ambiguous at best," and found that all but two of the discriminatees had never been recalled. 241 NLRB 589, 595 (1979). Discriminatees Fonseca and Louis were reinstated subsequently. However, the ALJ indicated that their positions were not substantially equivalent on account of factors other than reduced seniority.

Rainbow contends that the discriminatees' searches for interim employment were unreasonable as a matter of law. It relies on Mercy

Peninsula, 589 F.2d 1014 (9th Cir. 1979), in which the court fund that an average of three attempts per month to secure employment was not reasonably diligent. Id. at 1018-19. Rainbow argues that in light of Mercy Peninsula, the discriminatees were not reasonably diligent because they did not attempt to secure employment on an average of three times per month.

We do not read Mercy Peninsula as adopting a fixed standard that is applied mechanically to determine if a job search was reasonably diligent. The Mercy Peninsula court noted: "[G]iven the quantity and quality of Castle's efforts and the fact that they were executed with such disinterest, we believe that neither the ALJ nor the Board correctly

applied the standard of 'reasonableness. . . .'" Id. at 1018 n.6. The court's decision was influenced by the quantity and quality of the job search, as well as the sincerity of the discriminatee in seeking employment. We reject Rainbow's assertion that mere failure to seek employment three times per month constitutes unreasonable diligence. See Alfred M. Lewis, Inc. v. NLRB, 681 F.2d 1154, 1156 (9th Cir. 1982).

Rainbow contends that the backpay claims are barred because the discriminatees willfully concealed interim earnings. The Board may deny backpay for periods during which a discriminatee had interim employment or earnings which were intentionally

concealed. See NLRB v. Flite Chief, Inc., 640 F.2d 989, 992-93 (9th Cir. 1981). Intentional concealment does not include inadvertent failure to report earnings because of poor record keeping or faulty memory. See Hickory Bests, Inc., 267 NLRB 1274, 1276 (1983). The ALJ's finding that there was no showing of willful deceit is adequately supported. Rainbow's remaining arguments are without merit.

We observe that the Board concedes that its backpay order should be modified to award discriminatee Ralph Kaui total net backpay of $15,906.08.

The Petition for Review is DENIED, the Order is MODIFIED as to Ralph Kaui who is to be awarded total net backpay of $15,906.08 plus interest, and the Order is ENFORCED AS MODIFIED.

266 NLRB No. 103

RAINBOW COACHES

Rainbow Tours, Inc., d/b/a Rainbow Coaches and Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Ronald Sai, and Garret Wong. Cases 37-CA-1341, 37-CA-1342, and 37-CA-1387

March 28, 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On March 29, 1979, the Board issued a Decision and Order[1] against the Respondent in which the Board ordered the Respondent, inter alia, to make whole certain of its employees for any losses resulting form the Respondent's unfair labor practices. On October 29, 1980, the United States Court of Appeals for the Ninth Circuit entered its judgment enforcing in full

the Board's Order. A controversy having arisen over the backpay owed discriminatees Simeon (Jay) Agao, Michael Akamine, Miles Fonseca, Yukio (Ross) Iho, G. Lane Kaaiai, Eric Kama, Ralph Kaui, James Louis, Ronald Sai, and Henry Sanford, the Regional Director for Region 20, on September 30, 1982, issued and caused to be served on the parties a backpay specification and notice of hearing alleging the amount of backpay due the individual discriminatees. Subsequently, on October 14, 1982, the Respondent filed an answer generally denying each allegation of the specification, asserting that the General Counsel failed to take into account the seasonal nature of the business and setting forth certain

affirmative defenses that relate in part to alleged interim earnings.

On December 1, 1982, the General Counsel filed with the Board a Motion for Partial Summary Judgment. Thereafter, on December 14, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not be granted. On January 10, 1983, the Respondent filed a response to the Notice To Show Cause and an amended answer. Subsequently, the General Counsel filed a "Motion to Strike Respondent's First Amended Answer and To Find Backpay Specification True and Motion for Partial Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor

Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.54(b) of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> (b) Contents of the answer to specification.--The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating

> as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

In the original answer to the backpay specification, the Respondent offered a general denial to each of the allegations of the backpay specification. In his Motion for Partial Summary Judgment, the General Counsel asserts that the Respondent's

answer constituted a general denial that the method and elements involved in the Regional Director's gross backpay computations are correct, that the Respondent's answer failed to set forth any alternative formula or figures for any of the gross backpay computations or elements involved therein as required by Section 102.54(b) of the Board's Rules and Regulations, and that such elements are specifically within the knowledge of the Respondent. The General Counsel therefore contends that the allegations in the backpay specification, except as to interim earnings, should be deemed admitted as true and that summary judgment should be granted as to the computation of gross backpay.

In its response to the Notice To Show Cause and in its amended answer, the Respondent repeated its denial of the allegations of the backpay specification. The Respondent, however, also set forth specific alternative gross backpay figures with respect to discriminatees Agao, Fonseca, Iho, Kama, Louis, and Sai. Although the amended answer filed with the Board was not sworn to by the Respondent or by a duly authorized agent of the Respondent, copies of the same amended answer filed on February 7, 1983, bore the necessary oaths.[2]

The Board has held that, even in the absence of an amended backpay specification, a respondent may amend its answer prior to a hearing in the matter.[3] The Respondent's amended

answer generally denies the allegations of the specification with respect to discriminatees Akamine, Kaaiai, Kaui, and Sanford without setting forth the alternative formulas or figures required by Section 102.54(b). The Respondent did provide alternative gross backpay figures as to discriminatees Agao, Fonseca, Ihō, Kama, Louis, and Sai. We find that the Respondent's amended answer with respect to the amount of gross backpay owed these six discriminatees is sufficient to raise an issue of fact which can best be resolved in a hearing. Accordingly, we shall grant the General Counsel's motion for Partial Summary Judgment only with respect to the specification's allegations as to the amount of gross

backpay due discriminatees Akamine, Kaaiai, Kaui, and Sanford. We further find that Respondent's general denial is sufficient to place interim earnings into issue for all discriminatees because that information is generally not within the knowledge of the Respondent.[4]

ORDER

It is hereby ordered that the General Counsel's Motion for Partial Summary Judgment as to gross backpay computations is hereby granted only with respect to gross backpay computations for Michael Akamine, G. Lane Kaaiai, Ralph Kaui, and Henry Sanford.[5]

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for

Region 20, for the purpose, if necessary, of arranging and giving notice of a hearing before an administrative law judge, at which hearing the issues shall be limited to determining the gross backpay due discriminatees Simeon (Jay) Agao, Miles Fonseca, Yukio (Ross) Iho, Eric Kama, James Louis, and Ronald Sai, and the interim earnings of all of the discriminatees.

FOOTNOTES

[1] 241 NLRB No. 103.

[2] Accordingly, we deny as lacking in merit the General Counsel's motion to strike Respondent's first amended answer.

[3] E. A. Fuller Bentleys, Inc. d/b/a Bentleys Lounge, et al., 265 NLRB 632 (1982); and Standard Materials, Inc., 252 NLRB 679 (1980).

[4] Dews Construction Corp., a subsidiary of The Aspin Group, Inc., 246 NLRB 945 (1979).

[5] We deny also as without merit the Respondent's request for factual information and its application for leave to take depositions.

NLRB - ORDER SECTION

5/27/83 - 4:00 p.m.

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RE: RAINBOW TOURS, INC., d/b/a RAINBOW COACHES, CASES 37-CA-1341, ET AL.

RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND STAY OF PROCEEDINGS IS DENIED WITHOUT PREJUDICE TO RESPONDENT'S RIGHT TO RENEW ITS CONTENTIONS THROUGH THE FILING OF AN APPROPRIATE EXCEPTION.

BY DIRECTION OF THE BOARD: DATED, MAY 27, 1983.

Joseph E. Moore
Associate Executive
Secretary

280 NLRB No. 17

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAINBOW TOURS, INC., d/b/a RAINBOW COACHES	Case 37-CA-1341
and	
HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	
RONALD SAI, an Individual	Case 37-CA-1342
GARRETT WONG, an Individual	Case 37-CA-1387

SUPPLEMENTAL DECISION AND ORDER

On 12 April 1984 Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rainbow Tours, Inc., d/b/a Rainbow Coaches, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall pay Simeon Agao, Jr., Michael Akamine, Miles Fonseca, Yukio Iho, Lane Kaaiai, Eric Kana, Ralph Kaui, James

Louis, Ronald Sai, and Henry Sanford the sums set out in the recommended Order.

DATED, Washington, D.C. 30 May 1986.

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

FOOTNOTES

[1] We deny, as lacking in merit, the Respondent's motion to strike the General Counsel's brief in response to the Respondent's exceptions, and the General Counsel's motion to strike the Respondent's motion. We also deny the Respondent's motion for reconsideration inasmuch as it does not contain any newly discovered evidence or evidence not previously considered by the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Dotson agrees with the conclusions reached by the judge regarding the discriminatees' duty to mitigate the Respondent's backpay liability. In reaching these conclusions, however, the Chairman relies on the analysis set forth in Brady v. Thurston Motor Lines, No. 83-1765 (4th Cir. Feb. 6, 1985).

TABLE OF CONTENTS

PAGE

I. Issues 2

II. Findings of Fact 3

A. Preliminary Matters 3

1. Motion to Correct Transcript 3

2. Due Processes Argument 4

a. Delay 4

b. Lack of Discovery 6

c. Laches 7

d. Modifications to the Backpay Specifications .. 7

3. Jurisdiction 9

4. The Issues Involving Subpoenas 10

a. State Subpoenas 10

b. Subpoenas Issued to the City and County of Honolulu the 12

c. Bank Subpoenas . 14

B. Gross Backpay 17

1. Background 17

2. Position of the Parties 17

3. Representative Employees 19

4. Seasonality 22

5. Utilization of a 12-Week Period 23

6. Conclusions 25

Appendix F vi
Appendix G vii
Appendix H viii
Appendix I ix
Appendix J x

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

RAINBOW TOURS, INC. d/b/a
RAINBOW COACHES

and Cases 37--CA--1341

HAWAII TEAMSTERS AND ALLIED WORKERS
LOCAL 996, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

and 37--CA--1342

RONALD SAI, An Individual

and 37--CA--1387

GARRETT WONG, An Individual

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Wayne Matsuura, Esq., Deputy Attorney General, of Honolulu, HI, for the State Department of Labor.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOAN WIEDER, ADMINISTRATIVE LAW JUDGE: This supplemental proceeding was heard at Honolulu, Hawaii on various dates in May, June, July, and August 1983. A backpay specification and notification was issued on September 30, 1982, predicated on a decision and order of the Board dated March 29, 1979, 241 NLRB 589, which found that Respondent discriminatorily discharged 12 employees and granted super-seniority to non-strikers in violation of Section 8(a)(3) and (1) of the Act, and provided that they be reinstated and reimbursed for all wages and other benefits lost between the date of the discharge and their reinstatement, with interest to be

computed thereon in the manner prescribed in F.W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). See also Isis Plumbing & Heating Co., 138 NLRB 716 (1962). The United States Court of Appeals for the Ninth Circuit entered its judgment enforcing in full the Board's order. N.L.R.B. v. Rainbow Tours, Inc., 628 F.2d 1357 (1980).

The parties' disagreement over the backpay owed discriminatees Simon (Jay) Agao, Michael Akamine, Miles Fonseca, Yukio (Ross) Iho, G. Lane Kaaiai, Eric Kama, Ralph Kaui, James Louis, Ronald Sai, and Henry Sanford, led to the issuance of the backpay specification. Respondent's answer, filed October 14, 1982, generally

denied each allegation of the specification. The General Counsel, on December 1, 1982, filed a motion for partial summary judgment. On December 14, 1982 an order was issued transferring the proceeding to the Board directing the parties to show cause why General Counsel's motion should not be granted. Respondent replied on January 10, 1983 and filed an amended answer. General Counsel filed a motion to strike Respondent's first amended answer; moved to find the backpay specification true; and, further, moved for partial summary judgment. The Board found, in a supplemental decision and order, 266 NLRB No. 103, March 28, 1983, that Respondent's amended answer failed to deny with the requisite specificity

the allegations with respect to discriminatees Akamine, Kaaiai, Kaui and Sanford. Therefore, gross backpay is an issue only as to discriminatees Agao, Fonseca, Iho, Kama, Louis, and Sai. Interim earnings is in issue for all discriminatees.

I. Issues

Respondent raised both procedural and substantive issues. These issues include assertions that: the formula utilized by the Regional Director to determine gross backpay was the improper basis for such computation; the interim earning calculations for the discriminatees were erroneous; discriminatees willfully failed to mitigate damages; discriminatees Fonseca and Louis were reinstated and then voluntarily quit; the failure to

permit discovery so denied Respondent the rights guaranteed it under the Fifth and Sixth Amendments of the United States Constitution affording due process of law and jury trial as to preclude the presentation of a defense; the Board should find that certain claimants withheld relevant information from the Board prior to hearing, which should relieve Respondent of all interest assessments regarding those claimants; some discriminatees concealed interim earnings and failed to respond in a timely manner to Board requests for information; and, the failure of certain claimants to keep or furnish the Board with accurate records of job search constitutes a bar to their claim for backpay, for the failures

were sufficiently flagrant as to constitute willful concealment of interim earnings. Also, certain issues arose at hearing regarding petitions to revoke several of Respondent's subpoenas.

Upon the entire record, and from my observation of the witnesses, I make the following:

II. Findings of Fact

A. Preliminary Matters

1. Motion to Correct Transcript

On October 5, 1983, Respondent filed a motion to correct the transcript. In particular, it requests that a substantial number of exhibits be acknowledged. To appreciate the need for the request, it must be noted that the reporting service failed to submit a complete,

understandable record. It submitted an incomplete set of exhibits in a form that ignored any sense of order. Repeated requests to the reporting service failed to produce the missing exhibits and joint requests to the parties for copies was the only method available to ensure completion of the record. Also, in some instances the transcript was unclear as to the disposition of several exhibits. In other instances the record clearly reflects dispositions which Respondent claims are inaccurate. This confusion may be ascribed in part to the failure of the reporting service to present a complete set of exhibits in usable form. This failure occurred after repeated requests during the trial to the reporting service to take measures

ensuring retention of a complete set of exhibits in a rational order. To accomplish this end, counsel for Respondent, Knorek, remained every evening to review the exhibits with the reporter to ensure that the reporting service had complete sets of exhibits in order. These efforts were expended to no avail.

Also the reporting service, contrary to request, did not maintain a rejected exhibit file. Therefore any use of exhibits must be done with great care since there was no way to ascertain from the files which exhibits were rejected and which were admitted. Resort must be made to the transcript.

Counsel for General Counsel opposes the motion to correct the

transcript with regard to Exhibits C-26, C-27 and C-28, which Respondent contends were moved and received in evidence. The transcript reflects that at the time the exhibits were initially moved they were not admitted for lack of authentication and, at the time authentication was attempted, the exhibits were shown to be either irrelevant or Respondent failed to provide the requisite authentication. They were not admitted into evidence. With respect to Respondent's Exhibits E-19(1), and E-19(2), these applications of Kaaiai were never moved into evidence. The motion as to these exhibits is denied. E-23 has been admitted and the mis-marking noted in the motion will be, and is hereby, corrected. The motion to

correct the transcript, to reflect that Respondent's Exhibits H-20, H-21, H-24 through H-33, and H-37 have been admitted, is granted. The motion to correct the transcript to reflect that Respondent's Exhibit I-5 is admitted, is granted. The motion to correct the transcript to reflect that Respondent's Exhibit J-2 was admitted is granted.

The motion to correct the transcript so it indicates that Exhibits A-13, C-46 and C-47, E-20 through E-22, and H-17 were identified is granted and the appropriate indices should be so modified. Also omitted from the indices are the proper notifications that Respondent's Exhibits C-31, C-32, C-48; E-26, E-30, E-32; G-14; H-19, H-19(1), H-38, H-45;

I-19; J-18; M; and R-2 were rejected. The indices should be amended to properly indicate these dispositions.

The motion to correct the transcript to indicate that Respondent's Exhibits C-24, C-25, C-28, C-33, C-35 and C-36; E-28; H-42; and J-1 were withdrawn, is granted.

2. Assertion that Board Processes in Backpay Proceedings, as Applied in this Case, Denied Respondent Due Process

a. Delay

Respondent claims that is has been denied due process for several reasons. One reason is the amount of time it took the Board agents to obtain information from the claimants, delays which were unexplained. These delays, it is argued, when cojoined with denial of discovery, and my rulings on subpoenas, resulted in the

creation of irrebuttable presumptions which Respondent was denied the opportunity to test. For example, it asserts lack of opportunity to determine whether claimants took reasonably sufficient steps to mitigate backpay.

Respondent cites two cases to demonstrate that it has been denied due process. The first is Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp., 506 F.2d 467, 469 (9th Cir. 1974), which provides:

> The due process clause, in its procedural as opposed to its substantive aspects, guarantees plaintiffs that their liberty and property interests will not be invaded by the government except insofar as they are given an opportunity to challenge the purported justification (legal, factual, or both) of the invasion. Thus, to make out a prima facie claim that they have been denied due process, plaintiffs must establish two

> elements: (1) that their liberty or property interests have been invaded by the government without an opportunity to challenge that invasion, and (2) that the purported justification for the invasion is at least plausibly disputable (otherwise an opportunity to challenge that justification would be an empty formality).

The record demonstrates that Respondent was afforded every opportunity to challenge the claim of violation made in the underlying unfair labor practice case, which was tested in exceptions filed with the Board, and in its resort to the Ninth Circuit Court of Appeals. Having been adjudicated a violator of the Act responsible for reinstatement of employees, Respondent waited several years before engaging in any self-help remedies by making a good faith offer of reinstatement to most, if not all,

of the employees found to be discriminatees. This delay occurred despite the fact that it was ordered to reinstate these employees and failed to do so until around the time of the Ninth Circuit's decision in this matter. Respondent undisputedly had the right to assume this risk of litigation, but has no right to be saved from its consequences.

Respondent also failed to show that the asserted justification for the "invasion is at least plausibly disputable." Id. Respondent has the clear burden of proof, as the wrongdoer, to show that the discriminatees improperly failed to mitigate damages. It is undisputed that the Board agents, well before trial, gave counsel for Respondent

complete access to all material in their possession relevant to interim earnings and computation of backpay. General Counsel made all discriminatees available at trial for examination by the Respondent. At Respondent's behest, the entire General Counsel's file was inspected in camera to ensure that all evidence that could be construed as facts had been made available to Respondent. That General Counsel accumulates information does not indicate any assumption of an obligation to show whether the discriminatees took reasonable and sufficient steps to mitigate backpay. The employer has the burden of proving the affirmative defense of failure to mitigate. See N.L.R.B. v. Mooney Aircraft, Inc., 366

F.2d 809, 813 (5th Cir. 1966); Florence Printing Co. v. N.L.R.B., 376 F.2d 216,223 (4th Cir. 1967), cert. den. 389 U.S. 840; Alamo Express, Inc., 217 NLRB 402 (1975) at 403, citing Brown & Root, Inc., etc., 132 NLRB 486, 501, 540-543 (1961), enf. 311 F.2d 447 (C.A. 8, 1963); and I. Posner, Inc., etc., 154 NLRB 202, 204 (1965).

As Judge Learned Hand reasoned by analogy, "[i]t rest[s] upon the tort-feasor to disentangle the consequences for which it was chargeable from those from which it was immune." N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 872 (2nd Cir. 1938). "[T]he most elementary conceptions of justice and public policy require that the wrongdoer

shall bear the risk of the uncertainty which his own wrong has created." Midwest Hanger Co., 221 NLRB 911, 917 (1975), enf. in relevant part, 550 F.2d 1101 (8th Cir. 1977), citing Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946) . That Respondent chose to risk the potential infusion of vagaries caused by the passage of time occasioned by awaiting the results of its appeals before offering the claimants reinstatement, does not alter its burden of proof or serve to shift the burden to General Counsel.

Respondent also asserts that the amount of time it took from the original decision adjudicating the issue of discrimination in March 1979 until the start of this hearing in May

1983, was so great as to render the accumulation of information sufficient to sustain the burden of proving mitigation an impossibility. The Supreme Court, in N.L.R.B. v. Rutter-Rex Mfg. Co., 296 U.S. 458 placed the cost of any delay upon the employer, stating:

> "Wronged employees are at least as much injured by the Board's delay in collecting their backpay as the wrongdoing employer." In view of the "economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the backpay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 180 (2nd Cir. 1965). This court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers . . . . [Citations omitted.]
>
> . . . [T]he Board could properly conclude backpay is not

> only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act. Cf. Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941).

As an aside, Respondent did not aver inability to pay and therefore this issue is not under consideration. See Schnadig Corp., 265 NLRB No. 20 (1981).

The National Labor Relations Act requires the wrongdoer "to bear the risks of uncertainty, as to the extent of the consequences ascribable to their own actions." International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B., 426 F.2d 1243, 1251-1252 (D.C. Cir. 1970), cert. den. 400 U.S. 950. As the Court noted, in Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. at

265, "The most elementary conceptions of justice and public policy require the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." See further N.L.R.B. v. Katz et al., 369 U.S. 736 at 748, fn.16 and citations contained therein.

Thus, although unconditional offers of reinstatement went out to all employees on October 6, 1980, the undisputed failure of the Board to collect information regarding the efforts of the discriminatees to mitigate backpay until the spring of 1982 does not eliminate or otherwise alter Respondent's burden of proof. This defense is found to be without merit.

b. Lack of Discovery

Respondent asserts that lack of pre-trial discovery is a denial of due process. It is well settled that the Fifth Amendment does not require that parties to Board proceedings be permitted pre-hearing discovery. N.L.R.B. v. Valley Mold Co., 530 F.2d 693, 695 (C.A. 6, 1976), cert. den. 429 U.S. 824; N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 854, 857-858 (C.A. 2, 1970), cert. den. 402 U.S. 915 (1971). It is further held that the National Labor Relations Act does not require or even specifically authorize the Board to adopt discovery procedures. Electromec Design and Development Co. v. N.L.R.B., 402 F.2d 631, 635 (C.A. 9, 1969); N.L.R.B. v. Leprino Cheese Co., 424 F.2d 184, 187

(C.A. 10, 1970), cert. den. 400 U.S. 915; N.L.R.B. v. Interboro Contractors, Inc., supra at 858. See further J.H. Rutter-Rex Mfg. Co., 194 NLRB 19 (1971), 396 U.S. 258 (1969). See further Flite Chief, Inc., 246 NLRB 407 (1979); Medicine Bow Coal Company, 217 NLRB 931 at 932-937 (1975); and Magic Pan Inc., 242 NLRB 840 (1979). This defense is found to be without merit.

c. Laches

Respondent, in its first amended answer and also as part of its denial of due process argument, raises laches as a defense. This defense is related to its allegation that it has been prejudiced by the system employed by the Board to conduct backpay proceedings, particularly in the

allocation of burden of proof and development of evidence. As noted by Counsel for General Counsel, the doctrine of laches is not a defense applicable to backpay proceedings nor does it toll the backpay obligation. Citing Southeastern Envelope Co., 246 NLRB 423, 427 (1979); N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., Inc., supra 296 U.S. 458 (1969); International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corp.), 213 NLRB 457, 460 (1971); N.L.R.B. v. Ozark Hardware Co., 282 F.2d 1, 6 (C.A. 8, 1960). This defense is found to be without merit.

d. Modifications to the Backpay Specifications

The backpay specifications were modified at least four times. The

initial modification occurred the first day of trial before testimony was taken. This amendment was generated by Board's compliance officer Pamela Talkin's discovery of additional income by the immediately before the commencement of the hearing during interviews with the discriminatees. Another modification was occasioned by the discovery of a minor computational error by the compliance officer. Respondent contends that these amendments created confusion and it did not have an opportunity to verify the additional earnings. Respondent did not describe with specificity any difficulty occasioned by these amendments, and the almost two-month hiatus in the trial between June 3 and July 26

afforded more than ample opportunity to test the accuracy of these amendments.

In analyzing this as well as Respondent's other allegations, consideration must be given to the standard that where an employer has discharged an employee unlawfully, backpay is "the normal remedy". Golden Day Schools, Inc. v. N.L.R.B., 644 F.2d 834, 840 (9th Cir. 1981). The finding of discriminatory discharge "is presumptive proof that some backpay is owed by the violating employer". N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307, 1316 (D.C. Cir. 1972). Accord: N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 178 (2nd Cir. 1965), cert. den. 384 U.S. 972. The purpose of backpay is

"to vindicate the public policy of the [Act] by making the employee whole for losses suffered on account of an unfair labor practice." N.L.R.B. v. Dodson's Market, Inc., 553 F.2d 617, 620 (9th Cir. 1977), quoting Nathanson v. N.L.R.B., 344 U.S. 25, 27 (1972). The purpose of this proceeding is to restore "the economic status quo that would have obtained but for the company's wrongful refusal to reinstate. . . ." Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 188 (1973), quoting N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., Inc., supra 296 U.S. at 263. Accord: Kallman v. N.L.R.B., 640 F.2d 1103.

The employer must bear the burden of uncertainty in these situations. See Care Ambulance, Inc., 255 NLRB 417

(1981). As noted in Marlene Industries Corp. v. N.L.R.B., 440 F.2d 673, 674 (6th Cir. 1971), the General Counsel's burden in a backpay proceeding is limited to showing the gross backpay--what the employees would have earned if the employer had not contravened the Act. The employer then bears the burden of establishing deductions from the gross backpay; for example, interim earnings from alternative employment or willful failure to seek such employment. Id. See also N.L.R.B. v. Cambria Clay Products, 215 F.2d 48, 56 (6th Cir. 1954). See further, S.E. Nichols of Ohio, Inc., 258 NLRB 1 (1981).

Pursuant to the Board's Rules and Regulations, Series 8 (259 CFR Section 10253), the General Counsel is

required to present only "gross amounts of backpay." The General Counsel also includes in the backpay specification deductions for those amounts in mitigation which the General Counsel discovers through personal interviews, social security records, etc. The General Counsel performs this service in the public interest to provide full information to the employer and to limit the backpay demands, only where aware of sums in mitigation. As noted above, the General Counsel does not thereby assume "the burden of establishing the truth of all the information supplied or of negativing matters of defense or mitigation." N.L.R.B. v. Brown and Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963).

The initial modifications of the specifications prior to the commencement of hearing were merely General Counsel's revelations of additional discoveries of information. As such, they cannot be held to have assumed any role that is to be carried by counsel for Respondent who has the burden of establishing mitigation. That some of the information was voluntarily supplied, albeit at the eleventh hour, does not preclude its use. See Flite Chief Inc., et al, supra 246 NLRB at 407, enf. den. in part 640 F.2d 989 (9th Cir. 1981). The allegations involving individual discriminatees, wherein Respondent contends they willfully concealed interim employment with any fraudulent intent to increase

backpay specifications, will be discussed below.

The claimants were discharged at the end of January 1977. The Board, contrary to recommended but not required practice, failed to solicit information from the discriminatees until 1982. This delay understandably made it difficult for the individual discriminatees to list with specificity and accuracy the details of their job search and led to last minute disclosures and recollections after face to face interviews and discussions.

Although Respondent object to each amendment on the grounds it had no prior notice of such amendment, many of the amendments were occasioned by testimony and evidence adduced by

Respondent and Respondent clearly heard and had access to the same testimony as General Counsel who, as a courtesy to all, recalculated the specifications to ensure the clarity of the record. This practice is found to have assisted all, including Respondent.

Further, Respondent has failed to demonstrate specifically any injury from those modifications. It has merely made a bare assertion of prejudice. Respondent failed to state either at hearing or in its brief any instance where the scheduling of this proceeding or the granting of an amendment created a circumstance that would require the granting of a continuance. There was not one specific allegation that a witness was

unavailable, that time was inadequate to investigate a particular fact, that further delay would help clarify matters, or that any other argument would support the claim of prejudice occasioned by these amendments.

The assertion that the Office of the General Counsel was attempting to take actions designed to confuse matters is without merit. At no time prior to the close of this trial did Respondent develop any evidence that indicated the issues were more complex or required greater preparation than was apparent from its inception, or when the trial resumed at the end of July 1983. During the course of the hearing, the presentation of evidence proceeded without the slightest suggestion that the defense was in any

sense handicapped by a lack of preparation and, indeed, no specific details to the contrary were set forth by Respondent. A review of the record requires the conclusion that Respondent has still failed to show good cause for denying any of the amendments.

In sum, it is found that the modification to the specification either occurred prior to the commencement of hearing or merely reflects evidence adduced by Respondent. The modifications are consonant with established law. They have not been shown to be a willful concealment of interim employment from the Board's compliance officer with a fraudulent intent to increase the

issuance of backpay specifications or a denial of due process.

3. Jurisdiction

Respondent, in its October 14, 1982 answer to the backpay specification, asserted as its second defense that the Board lacks jurisdiction over Respondent. The raising of the issue at this juncture is clearly improper. As noted by the Administrative Law Judge in the underlying unfair labor practice proceeding, Respondent admitted, in its answer to the complaint, that at all pertinent times the company was an employer engaged in commerce and in a business affecting commerce. There is no indication that Respondent raised the issue of jurisdiction when it filed exceptions to the Administrative

Law Judge's finding of jurisdiction nor is there any indication that the issue was raised on appeal before the Ninth Circuit. Respondent's general denial of jurisdiction is found to be without merit and untimely. There is no showing that this issue was raised based on newly discovered evidence, previously unavailable evidence, or special entitlement to relitigate the issue. Pittsburgh Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941).

4. The Issues Involving Subpoenas

a. State Subpoenas

Respondent argues that it has been denied a reasonable opportunity to meet its burden of proof because the State of Hawaii's petition to revoke a subpoena requesting the custodian of the records of the Unemployment

Insurance Office, Unemployment Service Division, Department of Labor and Industrial Relations to produce certain records regarding the discriminatees was granted.

The State filed its petition to revoke at the commencement of trial on the basis of a statutory privilege.[1]

The State argued that the legislative history from the Standing Committee Report 206, Senate Committee on Labor, Hawaii Senate Journal 1969, p. 962, Standing Committee Report 159, House Committee on Labor and Employment Problems, Hawaii House Journal 1969, p. 668, and other records and archives clearly indicate that the only matters encompassed under the Federal Civil Rights Act of 1964 and state and local law

encompassing the same discrimination areas are exempted from this privilege. Copies of the senate journals were provided by the State's counsel. These reports make reference to state employment security agencies cooperating and assisting the fair employment practice agencies. Additionally, a letter from the Director of the Department of Labor referencing this legislation specifically refers to the anti-discrimination requirements of the Civil Rights Act of 1964.

Respondent has not adduced any evidence nor made any argument indicating that the legislative history requires an interpretation different from that propounded by the State in its petition to revoke. The

State of Hawaii has a policy of keeping the employment records confidential to encourage truthful reporting. Respondent asserts that the revocation of the subpoena deprived it of relevant evidence, records that would be probative of reasonable job search, and material useful for impeaching credibility and refreshing recollection.

As stated in John J. Canova, d/b/a Canova Moving and Storage Co. v. N.L.R.B., 708 F.2d 1498, 1502 (1983);

> Canova sought to use the records as evidence of lack of diligence in seeking interim employment. As the Board determined,[2] however, those records would only show what efforts the employees actually reported to the Employment Development Department and not necessarily what was actually done. This evidence would have had its most significant value in impeaching the employment. Canova had in its possession Board

> compliance documents and statements made by the employees concerning the job searches that contained evidence analogous to the Employment Development Department reports. Given Canova's opportunity to cross-examine [the discriminatee] . . . on the basis of these materials, Canova was not prejudiced by the revocation.

In this case, Respondent similarly sought the records for impeachment purposes. All records of the Board were turned over to the employer well before the commencement of hearing and the Board made all discriminatees available for examination by Respondent. Counsel for Respondent was aware of the Canova decision since it was cited to him the first day of trial. Counsel did not ask all the individual discriminatees if they filed any reports with the State which clearly and truly reflected their

efforts in procuring interim employment. Respondent did not ask any of the discriminatees what they filed, if they kept records or copies of these filings and if not, whether they would be willing to get copies from the State. Respondent has failed to state with specificity any reason that the State's claim of confidentiality and privilege should not be honored under the circumstances of this case. See N.L.R.B. v. Adrian Belt Company, 578 F.2d 1304, 1310 (1978). See generally, General Engineering, Inc. v. N.L.R.B., 341 F.2d 367, 372-3 (9th Cir. 1965), Herman Brothers Pet Supply, Inc. v. N.L.R.B., 360 F.2d 176 (6th Cir. 1966). See, further, Marine Welding

and Repair Work, Inc. v. N.L.R.B., 492 F.2d 526 (5th Cir. 1974).

Respondent requests reopening of the record on the basis of the revocation of this subpoena as well as the revocation of subpoenas served on several banks. This motion is denied. The subpoenas to the banks were conditionally revoked. As discussed more fully below, the subpoenas to the banks were not shown to be relevant. Respondent filed a special appeal to the Board concerning these rulings. The Board denied the appeal without prejudice. Respondent's request to consider the constitutionality of the state provision was also denied.

b. The Subpoenas Duces Tecum Issued to the City and County of Honolulu

Respondent's brief did not specifically address the issues it raised on the record regarding these subpoenas. This failure cannot be construed as a waiver of its objections. The City and County of Honolulu sought revocation of the subpoenas duces tecum issued to the custodian of records of the Department of Civil Service, Department of Public Workers, Department of Finance, and the Honolulu Fire Department. Unlike the State statute, it was found that the applicable statutes did not afford the City and County of Honolulu similar protection against production.[3]

The petition to revoke was only granted in part. It was granted as to

those portions of the subpoena referring to individuals for which there are no records. The remaining records of the City were reviewed in camera to determine if they should be released in toto since all records were requested. That portion of the subpoena regarding the performance and evaluation reports of the discriminatees who were parttime employees of Respondent and fulltime employees of the City and County of Honolulu Fire Department was not shown to be relevant. Respondent failed to show how the performance evaluation reports of the Fire Department were relevant to the issues of mitigation and gross backpay. The Fire Department leave records were found to be pertinent for they may indicate

when employees may have been unavailable for work or free to search for a job. The petition to revoke was denied as to those items. The petition was granted as to performance and evaluation reports of the parttime employee of Respondent who was a fulltime employee of the City and County of Honolulu's Refuse Department. Respondent failed to indicate that by granting the petition to revoke in part, it was deprived of documents which were relevant, material or otherwise properly sought. Respondent did not ask any of the discriminatees, who were the subject matter of the material sought in the subpoenas that were revoked, if they had copies of the material or any questions relating to that material

which might have demonstrated their relevance and materiality.

c. Bank Subpoenas

Respondent also subpoenaed several banks for their records of accounts in the names of some or all of the discriminatees. Some of the banks had representatives present in the courtroom but they declined to produce these documents for fear of violating state law. Some banks apparently did produce records although Respondent did not state which banks complied and which did not. An example of compliance is Respondent's Exhibit I-19, containing Sai's mortgage payments, which was not admitted into evidence for its relevance had not been established. There were also indications that Respondent had

received other bank records. Also, Fonseca's credit union statements were produced and were the subject of testimony by an employee of the Fire Department's credit union.

Counsel for Respondent represented that one of the banks subpoenaed was willing to comply with the subpoena providing that a certificate of compliance, pursuant to a federal statute, 12 U.S.C. Sec. 3308, was provided. The statute provides that a bank should not release the material until the government authority seeking such records certifies in writing that it has complied with the applicable provisions of the chapter. Compliance with the statute requires that individuals, whose bank records are subpoenaed, must be served with a copy

of the subpoena which is served upon the bank. Counsel for the General Counsel refused to sign the certificate of compliance, as provided in the financial privacy section of Chapter 12 and asserted that there was no reasonable cause to believe the records were sought for law enforcement purposes or that the notice provision of the statute had been satisfied. Counsel for Respondent admitted that the discriminatees whose records were sought were not served with copies of the subpoenas.

I find that these were private subpoenas; thus, according to the cited statute, it was not necessary to serve a copy on the discriminatees.

The banks requested during the trial that the officer issuing the subpoenas sign a document. I explained that I was not the issuing officer, but that I had no objection to ordering compliance if the relevance and materiality of the subpoenaed records were established. For example, Respondent was requested to establish whether the bank accounts were joint accounts or were in any way potentially probative of the issues involved in this proceeding. Respondent was permitted to repeatedly seek such information from the discriminatees to demonstrate probable relevance or materiality. Inexplicably, Respondent frequently failed to determine the nature of the accounts, such as whether they were

mortgage accounts, car loans, or accounts where the discriminatees were merely co-signers. Respondent, near the close of hearing, sought production of Kaaiai's bank records, yet admitted that Kaaiai was not subpoenaed, they knew he was residing on another island, the island of Hawaii. Thus even if the request were granted, there was no mechanism by which to test the relevance and materiality of the subpoenaed documents in Kaaiai's absence. Nothing occurred during the closing stages of this proceeding which would have accounted for Respondent's failure to subpoena Kaaiai at the time it moved for production of his bank records.

It is noted that the Fonseca credit union records, which were subpoenaed and were the subject of examination, were not offered as evidence. Also, on the last day of hearing, Respondent requested production of the bank records of Fonseca. Fonseca had testified that day and had been excused after giving rebuttal evidence. This request was not shown to have been justified by the finding of new material. Again, the untimely nature of the request was not explained. Respondent never clearly established that the banks which wished to have certificates of compliance were the same banks where Kaaiai, Fonseca or other specified claimants kept accounts.

The initial ruling refusing to order the banks to comply with the subpoenas was made early in the proceeding and was made subject to renewal by Respondents upon a showing of relevance and materiality.[4]

As noted in General Engineering, Inc. v. N.L.R.B., 341 F.2d 367 at 372-73 (9th Cir. 1975):

> The NLRB's own regulation authorizing revocation states:
>
> > The Administrative Law Judge or the [NLRB], as the case may be, shall revoke the subpoena if, in its opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. [Emphasis in original.] 29 CFR Sec. 102.31(b) (1979).

Respondent, though repeatedly informed that it should find out the nature of the accounts and other matters to permit a determination of whether the evidence related to the matters under consideration or in question in this proceeding, failed to elicit this testimony. The basis for such failure is unexplained, either on the record or on brief. Without this requested information, it could not be determined if the facts in dispute were more or less probable than they would be without access to the evidence. See Rule 401 of the Federal Rules of Evidence. For example, if a bank account reflected mortgage payments on a house owned by a spouse, where there is a separation or divorce with a discriminatee who does not have

any obligation to make payments, it would not tend to render a consequential fact more probable or less probable than it would without such evidence. Yet counsel repeatedly failed to ascertain the nature of the accounts subpoenaed or to describe such accounts so that the assessment of their relevance could be rationally made. Similarly, if there is a joint account with a spouse and the spouse makes all the deposits and withdrawals, or the account is maintained merely as a part of an estate plan, this would again be a situation where the existence of the account would not make a fact more or less likely than if there were no such evidence. No bank officials were called as witnesses.

Respondent still seeks access to these accounts, even though the record demonstrates that some banks had complied with these subpoenas, as detailed further in discussing the individual claimants' cases. Respondent has not indicated which banks had supplied such records and has not removed their names from the request. In sum, the Respondent failed to describe with specificity those accounts in banks which failed to comply with the subpoena in a manner which would permit a finding of potential relevance. Lack of relevance is a valid ground for quashing subpoenas or granting petitions to revoke. See Howard Johnson Company, 250 NLRB 1412, fn.2 (1980), citing Madeira Nursing Center,

Inc. v. N.L.R.B., 615 F.2d 728 (6th Cir. 1980). It is concluded that Respondent has failed to demonstrate the need to reopen the record to permit examination of the subpoenaed materials. Its brief fails to reveal any new or otherwise unconsidered basis for altering the rulings in the case. The motion to reopen is denied.

B. Gross Backpay and Conclusions

1. Background

In the underlying decision, supra 241 NLRB 589, the Board found, inter alia, that Rainbow Tours, Inc., by part-owner and principal operating officer Kolt, threatened the company's bus drivers if they sought union representations with the loss ". . . of [his] services, the accounts [he] brought in, any possibility of

additional new accounts, profits, the new buses, any possibility of wage increases and a question of whether the potential of loss the Company and their jobs would continue. . . .," in violation of Section 8(a)(1) of the Act. It was also found that Rainbow violated Section 8(a)(1) of the Act of January 31, 1977 by discharging employees Sanford, Kaui, Iho, Akamine, Agao, Fonseca, Uwata, Kaaiai, Kama, Louis, Sai, and Garrett Wong in retaliation for their support of the Union. Several of these discriminatees were fulltime employees. Sanford, Kaui, Akamine and Agao were listed as holding seniority numbers between 1 through 5 on the fulltime seniority roster. The remaining discriminatees were parttime

employees, many of whom had other fulltime employment. These parttime employees also were senior employees. It was also found that:

> . . . Sanford, Kaui, Iho, Akamine, Agao, Fonseca, Iwata, Kaaiai, Kama, Louis and Sai unconditionally offered to return to work on February 2, 1977, and G. Wong would have done so but for receiving a report that Kolt had refused to reinstate any of the 11 just named to their former positions and status. Id.

The decision also noted that Kolt offered Sanford, Kaui, Iho, Akamine and Agao reinstatement as new hires, resulting in a loss of seniority. These actions were not deemed valid offers of reinstatement and Respondent was ordered to reinstate the discriminatees "to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs with

full restoration of their seniority and other rights and privileges."

2. Position of the Parties

Based on the Board's supplemental decision and order issued herein on March 28, 1983, gross backpay is an issue only as to the following discriminatees: Agao, Fonseca, Iho, Kama, Louis and Sai. Partial summary judgment was granted as to the gross backpay computations for Akamine, Kaaiai, Kaui and Sanford. No gross backpay was computed for Paul Uwata, who returned to work shortly after he was discriminatorily discharged. However, as the records were not clear as to whether he was entitled to a day or two of backpay, a compliance officer gave the benefit of the doubt to Respondent. Uwata did not appear

and testify in the backpay proceeding. It is found that Uwata is not entitled to any backpay based on the lack of evidence of an entitlement.

The General Counsel's office has the burden of establishing gross backpay by seeking to ascertain the probable earnings of a discriminatee during the backpay period. These are earnings which would have been paid had the employee not been unlawfully discharged. See, generally, the National Labor Relations Board Case Handling Manual, Part 3, Section 10530.1(c). Four basic gross backpay formulas have been utilized by the Board and approved in the courts through the years. Case Handling Manual, Part 3. The compliance officer is charged with selecting the

most appropriate formula to apply in a specific case. See Section 10536 of the Case Handling Manual, Part 3, Compliance Proceedings. This burden of creating a method to determine what would have happened is recognized as frequently problematic and necessarily inexact. Taking cognizance of these difficulties, the Board ". . . is only required to employ a formula reasonably designed to produce approximate awards due." N.L.R.B v. Pilot Freight Carriers, Inc., 604 F.2d 375, 378-79 (C.A. 5, 1979), quoting Trinity Valley Iron & Steel Co. v. N.L.R.B., 410 F.2d 1161, 1177, n.28 (C.A. 5, 1969). Accord: N.L.R.B. v. Brown & Root, Inc., supra at 452.

In this proceeding, Formula 2 was chosen, which is set forth in Section

10540 of Part 3 of Case Handling Manual. Gross backpay was computed for the discriminatees under this formula using the average number of straight time and overtime hours each discriminatee worked per week during his last 12 full weeks of employment with Respondent, multiplied by the wage rate each individual would have received, taking into account when current employees received raises, plus an average amount of tips each received on a weekly basis prior to unlawful discharge. This figure was then reduced by the ascertained interim earnings to determine net backpay. One week during this 12-week period was not used since Respondent's yard was shut down, which was deemed an unusual or uncharacteristic time

period which should not be included in the computations. See Issac & Vinson Security Services, Inc., 208 NLRB 47 (1973). Respondent did not claim this week should be included in the backpay calculations. Respondent does not take issue with General Counsel's including increases in the gross backpay computations received by replacement employees over the backpay period.

Formula 2 was chosen to measure the projected earnings of the discriminatees as it was "most reasonably designed to produce the approximate awards due [Citations omitted]." Trinity Valley Iron and Steel Co. v. N.L.R.B., supra at 1177. The compliance officer relied on several factors in reaching this

decision: the length of the backpay period involved, several years; the need to take into account wage increases over such a long period, which the use of an average of the earnings of comparable employees similarly situated fails to do; the inability to find representative replacement employees similarly or comparably situated with the same skills or preferences, since Respondent honors individual preference for particular tours, particularly among the most senior employees, such as the discriminatees.

The Company's records reflected that the wages and hours worked by its employees fluctuated from week to week and from employee to employee, making it extremely difficult, if not

impossible, to determine which of Respondent's current employees were representative of particular discriminatees or all discriminatees. Also considered was the fact that the business operated 7 days a week and each employee had unique working conditions with regard to availability, seniority, skills and personal preferences. Thus, it was decided that the best measure of future hours was their part hours.

Respondent takes issue with General Counsel's choice of Formula 2 and the use of a 12-week period immediately prior to their discharge as the basis for determining earnings. Respondent contends that the General Counsel is seeking to accomplish a non-statutory objective.

Specifically, Respondent contends that General Counsel has chosen a time period and formula "to achieve ends other than those which can fairly be said to effectuate the policies of the Act." See further, N.L.R.B. V. Seven-Up Bottling Company of Miami, Inc., 344 U.S. 344, 347 (1953).

Respondent argues that the use of Formula 2 fails to account for the seasonality of the business and the use of the 12-week period unfairly increases the amount of backpay the employees would have earned if they had not been discriminatorily discharged. It urges that two different formulas be utilized, one for Agao and another for the remaining discriminatees. Also, Respondent contends that the 12-week period

utilized by General Counsel was atypical for it occurred when the business was beginning to prosper, yet the Company had few drivers which resulted in a unique increase in available straight and overtime work. The Company also claims this was a seasonally active period. The Case Handling Manual, at Section 10540.2(c), states that the chosen formula should be used when "the business of the . . . employer is not seasonal."[5]

3. Representative Employees

Respondent urges the use of Formula 4 for computing gross backpay for Agao. Formula 4 in the Board's Case Handling Manual is found in Section 10544. Formula 4 uses the earnings of replacement employees or

average earnings of replacement employees per pay period. This particular method of computation was urged because Agao was the only fulltime employee whose gross backpay was still in issue. Respondent would use the five most senior fulltime drivers' average quarterly earnings throughout the backpay period to determine Agao's gross backpay. For Fonseca and Sai, who were firemen and parttime employees of the company prior to their discriminatory discharge, Respondent urges using Formula 3, which is explained in detail in Section 10542 of the Case Handling Manual. This formula uses the average earnings or hours of a representative employee or employees who worked in a job similar to the

discriminatees before the unfair labor practice and during the backpay period. The use of this formula requires the selection of employees whose work, before the unfair labor practice and during the backpay period, is similar to that work performed by the discriminatee. The use of these formulas requires the ability to accurately identify representative employees.

In support of its argument urging use of Formula 4 for Agao, Respondent, on page 20 of its brief, refers to Respondent's Exhibit V-1 as demonstrating that fulltime drivers working for Rainbow during the backpay period would not have worked the hours alleged in the backpay specification nor earned the amount of gross

backpay. Respondent's Exhibit V-1 has not been shown to be reliable. Its computations are based on partial data. The methodology utilized to prepare the exhibit was not shown to be reliable or probative, was not shown to have a reasonable standard error, and was calculated from check stubs, 50 percent of which were missing. There is no basis on which to find these figures representative. The exhibit was accepted to permit Respondent to argue that General Counsel was seeking to accomplish a non-statutory objective with their calculations. The Company was invited to demonstrate that its methodology should be entitled to some weight but has failed to do so. In fact, it appears some of the statistics on the

exhibit probably commingled figures for fulltime and parttime employees. It used material developed in an exhibit marked for identification as Respondent's Exhibit V-2, which was not admitted because it was shown to be completely unreliable. The individual who prepared the records for Respondent could not recall the methods he used in its preparation, could not recall how he reached the figures, and could not recall the meaning of references in the exhibit. Since V-1 uses some material from V-2, which was not admitted, it is found to be entirely unreliable.[6] The methods used to compile both Respondent's Exhibits V-2 and V-3 did not permit the drawing of the inferences or conclusions necessary to

support the Company's assertions.

Respondent's Exhibit V-3 is the same as the average pay exhibit, Respondent's Exhibit V-1, except that it contains footnotes. The witness who prepared the exhibit did not add the footnotes, he did not know who did and, thus, the document was not admitted. It is concluded that Respondent's exhibits and other evidence fail to demonstrate any intent by General Counsel to achieve ends other than those which can fairly be said to effectuate the policies of the Act. On the contrary, Kolt's testimony and the Company's apparent inability to develop a reliable statistical analysis indicating the existence of comparable replacement employees confirms the suitability of

the formula selected by General Counsel.

Respondent has failed to demonstrate that the formula chosen by the compliance officer and General Counsel's office is particularly oppressive and is not calculated to effectuate the policies of the Act. While Formula 2 is said to be appropriate when the backpay period is short, it does not indicate any inappropriateness where there is a long backpay period. No formula is perfect or could unquestionably project actual earnings. Formula 3 was rejected as the fairest measure because replacement employees were paid more than claimants and, as is the case with both Formula 3 and Formula 4, Compliance Officer Talkin-

could not identify individuals who could fairly be considered replacement employees. No individuals were identified by any party as having worked comparable hours and demonstrated similar work preferences, such as choice of runs or buses. Further, these two formulas fail to take into account the fact, as determined by the Administrative Law Judge in the underlying unfair labor practice decision, that the discriminatees were the most senior employees in both the fulltime and parttime categories.

Respondent's own witnesses indicated that although the business was subject to wide fluctuations, they were weekly or daily, not seasonal.[7] (-ERROR-) asons for these

fluctuations, are not the only attributable to the nature of the business but include individual preferences. Respondent's witness Kolt, the managing director of Rainbow, most clearly presented the uniqueness of each driver's work schedule. Admittedly, seniority affected the drivers' scheduling and runs, which were dependent upon individual preference. The Company used the seniority system to give the individuals their choice which varied with their different wants. These accommodations were unique to each employee. Some individuals had Japanese language skills and liked to take Japanese tours. Kolt testified as follows:

> Seniority system in our company gives the individual

choice. Het /sic/ gets choices of what he wants. Depending on the individual, different guys want different things. . . .

Some guys want to take Haole tours, meaning tours that are narrated in English. They like the tips. They like the rapport with the people. They fancy themselves as entertainers, which I personally think they are. It's part of the job.

Some guys like -- some guys prefer the foreign site-seeing because they don't have to talk, or they don't feel like talking and also, the tips were a factor with the foreign tours. Tips were included. With the English-speaking tours, you had to kind of work for them.

Some guys preferred -- they would want to stay with a certain piece of equipment. Generally, the better ones, depending on -- you know, the senior guys got their choice of equipment, okay, but the equipment did not always go to the same place every day. We had to spread it out to keep all the customers happy.

These options remained the same after the strike.

Such individual selections can greatly impact on income. Some tours are four or more times longer than others. Some of the parttime employees would prefer to work more days or more hours than others. As will be noted in detail later, the firemen in particular worked several 24-hour days and then had several days off. They could individually elect how many days they wanted to work for Respondent on their days off from the Fire Department. Since the choice of tours was based on seniority, considering the options available and the record evidence, it is found that each employee's potential earnings, as compared to employees with the same or similar seniority, would not necessarily be representative or

otherwise analogous for computation of backpay. Respondent has failed to indicate how the formulas it urges overcome this difficulty or meet this exigency. The Company failed to show any replacement employee or employees were representative of a claimant. The Company also failed to show that its records do not correctly reflect its employees' wages prior to their unlawful discharges. Pat Izzi Trucking Co., 162 NLRB 242 (1966).

4. Seasonality

The testimony fails to demonstrate that the tourist industry is highly seasonal. The record clearly shows that the business is highly sensitive to market changes. Respondent's chief managing officer Kolt indicated that business changes on a daily basis,

affected by such factors as airline rates, holidays on the mainland, and weather on the mainland. Business increases with the severity of the winter on the mainland and decreases if the winter weather is good on the mainland. There was also testimony that the Christmas holiday season is a very active tourist time; but this factor is counterbalanced by the inclusion in the 12-week computation period of Thanksgiving and the period shortly thereafter, which is a very slow business period for the tour bus industry. The fluctuations that occurred during the 12-week period selected by Counsel for General Counsel were not shown to be aberrational or otherwise

unrepresentative of any other 12-week period.

In support of its position as to seasonality, Respondent produced a late-filed exhibit after the close of hearing, Appendix A, based on the plethora of material, particularly payroll records, introduced without objection into the record. Late-filed exhibits were permitted to avoid surprise occasioned by recalculation or utilization of portions of the voluminous payroll records in the simultaneously filed briefs. To afford comment on any such calculation, both parties were given the opportunity to file exhibits which detailed the exact calculations prior to the brief date. Respondent's

Appendix A was based on its voluminous payroll records.

Respondent merely stated that Appendix A was taken from Respondent's Exhibit V-6 and V-7, which are 1976, 1978 and 1979 payroll records. Why 1977 payroll records were not used is unexplained. These computer read-outs total thousands of pages. Respondent failed to state in its filing how the exhibits were compiled and its method of extrapolation. It is therefore found that this exhibit is unreliable and not probative.

However, even if Appendix A were found to be reliable, it demonstrates the lack of seasonality. As noted by both the compliance officer and Kolt, the amount of the Company's business varies greatly from week to week and

from day to day. For example, in 1980, the amount of business during the first and second weeks of the year was quite low, and yet in the third and fourth weeks there was an extremely high volume of business. Conversely, in the 1978, it appears that business declined during the second and third weeks of the year. Similarly, in 1980, there appears to be a decline in business around Thanksgiving and yet, in 1978, there appears to be an increase in business around that time. Therefore, it is found that Respondent's own exhibit demonstrates that there is no cyclical fluctuation in the business based on seasons and hence, there is no showing of seasonality. See Section 10540.2(c) of the Case Handling Manual.

5. Utilization of a 12-Week Period

Respondent's attack on the use of a 12-week period is not persuasive. The period was not shown to be insufficient in length to be truly reflective of actual earnings. According to Respondent's own questionable exhibits, there was no such thing as a representative week; each week and day are different and subject to caprices that are not seasonal, such as the booking of conventions and the weather in other parts of the world. A 12-week period was selected because some of the discriminatees only worked for Respondent during that period of time.

As noted by Administrative Law Judge Charles W. Schneider, in DeLorean Cadillac, Inc., 231 NLRB 329

at 332, "The actual earnings of employees in a representative period prior to their discharge is a foundational formula traditionally used by the Board in determining the amount of backpay due discriminatees." As Administrative Law Judge Knapp said, in Chef Nathan Sez Eat Here, Inc., 201 NLRB 343, 345 (1973):

> Actual earnings is "/t/he most fair, suitable and equitable formula to employ, and should not be departed from in the absence of special circumstances . . . ." The formula proposed here by the General Counsel substantially fits those requirements. It covers a period of employment broad enough to be representative, and recent enough to be typical of relevant performance. That being so, the burden is on the respondent to establish special circumstances requiring deviation from it, and to propose a more satisfactory formula. /Citation omitted./

As was the case in DeLorean Cadillac, Id., the Respondent failed to meet either of those burdens.

Respondent also failed to demonstrate that the 12-week period used by General Counsel was not representative of average earnings. In Erlich's 814, Inc., 241 NLRB 1114 (1979), it was found that earnings during a representative 10-week period preceding discharge, projected by calendar quarters over the backpay period, was a satisfactory method of determining gross backpay and was not arbitrary or unreasonable. In East Belden Corporation, 267 NLRB No. 46 (1982), slip op. p.5, the Board rejected Respondent's contention that the 8-week period chosen by General Counsel was inappropriate when it did

not provide a more appropriate period. As noted in N.L.R.B. v. Pilot Freight Carriers, Inc., 604 F.2d 375, 379 (5th Cir. 1979):

> The use of Johnston's average weekly earnings for the 7 weeks preceding his discharge as the basis for computing backpay was a reasonable formula because the strike was caused by the company's illegal action, any diminution in work opportunities during the strike period is no reason for reducing Johnston's award.

Respondent argues that its business increased since the unlawful discharges; that it had just commenced a building period during that time; that it had difficulty with equipment, which was subsequently replaced; that it has added customers; and thus, the use of actual hours may not reflect the time replacement employees, if such could be found, would have worked since there appears to be a greater

subsequent demand on employees. Compliance Officer Talkin testified that the 12-week computation period was selected not only because it was considered representative, but because Administrative Law Judge Christensen indicated in the underlying decision that Respondent added several buses and new accounts during this quarter. She thus determined that the period prior to the discharges was more indicative of future earnings. Respondent also avers that is has increased its fulltime staff, thereby eliminating the need for as many hours from parttime employees. Such an argument is mere surmise. It is unknown whether Respondent would have increased its fulltime staff in the same manner save for the unlawful

discharges, for there would not have been a dearth of experienced drivers. There was no showing such increases in fulltime drivers would have impacted on the income of the discriminatees, the most senior employees. Such surmise is insufficient to warrant a finding of the establishment of special circumstances requiring deviation from the proposed formula.

While an operational change more fulltime employees might have resulted in a change in earnings for the discriminatees, it is equally reasonable in assume that if the discriminatees were not discharged and were afforded the opportunity to continue working under the same system, which Respondent stated still obtains, their wages would have been

comparable to those of the backpay period selected by General Counsel, heretofore found appropriate. See East Texas Steel Castings Co., Inc., 116 NLRB 1336, 1337 (1956), enf. 255 F.2d 284 (5th Cir. 1957). Also, Respondent failed to reconcile this merely speculative contention with its admission that business has shown an overall increase which may have resulted in increased work for parttime employees.

In sum, Respondent has failed to indicate why any employee or group of employees' incomes were more representative than the discriminatees' earnings for the 12-week period used by General Counsel in computing backpay. Respondent has not met its burden of showing the

basis for computing gross backpay is ". . . a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co. v. N.L.R.B., 319 U.S. 540 (1943).

It is clear that General Counsel has met its requirement to select "a formula reasonably designed to produce the approximate awards due [Citations omitted.]." Trinity Valley Iron & Steel Co. v. N.L.R.B., supra, 410 F.2d at 1177, n.28. The utilization of a period immediately prior to the unlawful discharges has been found to be appropriate for use in formulating the earnings percentage or multiplier in the formulation of gross backpay. N.L.R.B. v. Pilot Freight Carriers, Inc., supra 604 F.2d at 375.

6. Conclusions

It is thus concluded that since Respondent has failed to show that employees it selected during the backpay period performed work during that period, which is representative of the work done by the class of discriminatees as a whole or for sub-groups within that class, its alternative proposals for computing gross backpay are rejected. Those groups of employees or employees selected as representative were not shown to have the same skills, work exigencies, or preferences. Respondent has singularly failed to show that there was a readily determinable individual or group of individuals who made the same choices of routes, buses, days off and other

income-producing factors as the discriminatees. Many of Respondent's alternatives are based on data that are not clearly defined or were derived in manners rendering them completely unreliable. The General Counsel affirmatively showed that its measure was reasonable, and the timely raised alternatives proposed by Respondent using replacement employees were not shown to have been representative of the discriminatees. General Counsel's premises for the use of the Formula 3 for gross backpay are found to be appropriate. As noted by the court in N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888 at 891 (1966):

> This formula may not reach the exactly correct figure, but there is no suggestion of a formula that could, since the

> discriminatees did not actually work during the period. The formula used is a reasonable and legal basis for computation of gross amounts, and has had approval in court decisions. See Chef Nathan Sez Eat Here, Inc., supra, 201 NLRB 343; NHE/Freeway, Inc., 218 NLRB 259; and DeLorean Cadillac, supra 231 NLRB 329 (1977).

Based on the exigencies present in this proceeding, and considering the conflicting backpay formula arguments, it is found that the formula propounded by General Counsel is the most accurate method of determining gross backpay. J.S. Alberici Construction Co., Inc., 249 NLRB 751 (1980); American Manufacturing Company of Texas, 167 NLRB 520 (1967). Where there are any uncertainties, such as the potential impact of the fluctuations in business and Respondent's employment of a greater

number of fulltime drivers after the strike and after the discharge of the discriminatees, they will be assessed against the wrongdoer. N.L.R.B. v. Miami Coca-Cola Bottling Company, 360 F.2d 569 (5th Cir. 1966).

Respondent failed to set forth an alternative formula or furnish appropriate supporting figures for computing the amounts owed with sufficient particularity and reliability as to permit the sought substitutions. The backpay award is only an approximation and the Board has considerable discretion in selecting a methodology which is reasonably designed to approximate the amount of backpay a wrongfully discharged employee would have received absent the employer's

wrongful conduct. Respondent has failed to show a representative employee or a backpay period that was demonstrated to be more representative than that chosen by General Counsel. Respondent's proposals are replete with numerous unsupported speculations and assertions. It is concluded that General Counsel's computations of gross backpay more than meets the legal standards of permissible discretion in determining approximate gross backpay. See N.L.R.B. v. Carpenters Union, Local 180, 433 F.2d 934 (9th Cir. 1970); International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corporation), 262 NLRB 421 (1982).[8]

C. Woolworth Formula

Respondent, based on its previously discussed claim of seasonality, requests relief from application of the Woolworth formula. Citing N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc., supra, 344 U.S. at 350 (1953). The court, Id. at 345, cited F.W. Woolworth Company, supra 90 NLRB at 292-293, stating:

> The public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." In order that this end may be effectively accomplished through the medium of reinstatement coupled with backpay, we shall order, in the case before us and in future cases, that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the respondent's discriminatory action to the date

> of a proper offer of reinstatement. The quarterly periods, hereinafter called "quarters", shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, and any other employment during that period. Earnings in one particular quarter shall have no effect upon the backpay liability for any other quarter.

The court further provides, Id. at 294, as follows:

> This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regarding to circumstances which may make its application to a particular situation oppressive and, therefore, not calculated to effectuate a policy of the Act. The company in this case maintains that it operates a seasonal business, that employees may earn three times as much in the first and fourth quarters of a year as in the second and third, and that a quarterly calculation of backpay would, in this context, be obviously unjust.

Respondent states that the use of the Woolworth formula is oppressive in the instant proceeding because it operates a seasonal business. As noted above, there was no showing of seasonality. Rather, there were great fluctuations in the business and in income among the individual drivers week to week, day to day, with no showing that such fluctuations were attributable to seasonal factors. Further, there was no showing that these fluctations occurred within the backpay period in such a pattern or under any other special circumstances that would create an injustice if the Woolworth formula were applied.

There was no showing that any employee sufficiently representative of any of the discriminatees received

less money than a discriminatee would have received during the same period; nor was there any showing that applying the Woolworth formula in the computation of interim earnings would result in a windfall. As the Board noted in Robert E. Cashdollar, Sr. d/b/a Nelson Metal Fabricating, 259 NLRB 1023, 1024 (1982), Respondent's contention that computation of backpay on a quarterly basis was inequitable without foundation in law or reason is unpersuasive, for while application of Woolworth was never intended to be rigid or inflexible, there was no showing that the application of the formula produced a punitive remedy inasmuch as the employer rightfully exercised its right to assume the risk to resist reinstatement and backpay

until after court enforcement of the Board's order, risking the potential that the discriminatees would seek more gainful employment for a greater part of the backpay period. It took the risk and lost. This assumption of knowledgeable risk does not constitute an inequity or special circumstance of the genre discussed in Seven-Up Bottling. supra 344 U.S. at 350, or warrant application of the pre-Woolworth rule. The Woolworth formula will be used in the computation of interim earnings where such earnings are found to properly obtain.

D. Other Affirmative Relief

1. Fraudulent Concealment and Poor Record Keeping

During the trial, Respondent was permitted to amend its reply to

include as an affirmative defense the assertion that claimants who were found to have withheld relevant information from the Board prior to the hearing be found to have fraudulently concealed interim earnings. The Company was also permitted to argue that any employee who failed to respond in a timely fashion to the Board's request for information should not profit from these acts by permitting Respondent to be relieved of all interest payments. It also urges that all claims for backpay be barred when claimants failed to keep records or refused to furnish the NLRB with reasonably accurate records of their job search, because such failure constitutes a

willful nondisclosure of material evidence.

The Board, in American Navigation Co., 268 NLRB NO. 62 (1983), recently found that entitlement to backpay is dependent upon the determination that such an award is necessary to effectuate the policies of the Act, citing Phelps-Dodge Corp. v. N.L.R.B., supra, 313 U.S. at 198, which is quoted as follows:

> [W]e must avoid the rigidities of an either-or rule. The remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. In applying its authority over backpay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to obtain just results in diverse, complicated situations. [Footnote omitted.]

In analyzing the situation where there was a willful concealment of

earnings, the Board determined that backpay will be denied for the quarters involving such concealment. The Board further found, however, with regard to the backpay for other quarters:

> On the other hand, to deny backpay in an amount that exceeds that which is necessary to deter deception is to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct for no useful purpose. We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and also deter respondents from committing future unfair labor practices. This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings. [Footnotes omitted. American Navigation Co., supra 268 NLRB No. 62 (1983), slip op. pp. 7-8.]

The testimony has been be evaluated and the facts analyzed to determine if there was a failure to report earnings and if such failure resulted from a deceitful intent or honest error. There was no showing of willful deceit. The failure of claimants to accurately recall facts over the long period of time involved in this case, is insufficient to deny the claimants a make-whole remedy, including interest. Respondent must show that the claimants' conduct was sufficiently egregious to warrant forfeiture of a remedy designed to effectuate the purposes of the Act. It has failed to meet this burden of proof. See Iowa Beef Packers, Inc., 144 NLRB 615, 622 (1963); and D.V.

Copying and Printing, Inc., 240 NLRB 1275, fn.2 (1979).

The Board addressed the issue of poor recall and record-keeping in Arduini Mfg. Corp., 162 NLRB 972, 975 (1967), holding as follows:

> While claimants may have some difficulty in recalling past events and were guilty of poor record-keeping, the fact that they testified openly and fully to the best of their recollection and disclosed all interim earnings, withholding nothing, does not present facts barring recovery. The burden still remains on the Respondent to show failure to mitigate or otherwise reduce or eliminate entitlement to backpay."

Discriminatees were not sent backpay claim forms until 1982. When asked, their testimony varied as to their reasons for submitting incomplete forms. Claimants are not disqualified from receiving backpay solely because of poor record keeping

or uncertain memories. See Patrick F. Izzi, d/b/a/ Izzi Trucking Company, 162 NLRB 242, 245; Hickory's Best, Inc., 267 NLRB No. 199 (1983), slip op. p. 10. All the claimants were made available repeatedly for examination by Respondent. There was no showing that any of the claimants engaged in falsehoods, padding of expenses or claiming expenses that were unreasonably large. Respondent was also afforded every opportunity to call and examine representatives of all companies named by the claimants. That these companies by and large failed to keep records more than a year is not a circumstance that should redound to the detriment of the claimants. The holding of this backpay hearing, well after valid

offers of reinstatement were made to the claimants, was not by their choice.

Under these circumstances, the claimants' poor record keeping and reporting practices are not sufficient to abrogate their entitlement to backpay. Poor record keeping may have relevance only as it may impugn the reliability of the claimants' testimony. In general, the claimants impressed me as honest witnesses who received large packets of forms from the General Counsel's office long after the events in question. Many claimants delegated the completion of the forms to spouses or other relatives. Poor record keeping was not shown to be intended to deceive or mislead. The failure was more the failure of Board personnel to follow

usual practices of clearly informing alleged discriminatees around the time a complaint is issued of the necessity to maintain and retain records of their job searches and interim earnings as well as expenses incurred in such activities. This failure by the Board should not and does not redound to the detriment of the claimants. Respondent's own election to defer its offers of reinstatement until resolution of the underlying unfair labor practice proceeding by the Ninth Circuit Court of Appeals was also a cause of delay. This self-inflicted burden does not alter the outstanding case law as to the claimants' obligation to maintain and retain records. Accordingly, Respondent's assertions that this

failure denied the Company due process or abolishes its backpay obligations are without merit.

E. Interim Earnings

1. In General

Respondent asserts that each claimant's net backpay should be reduced since there was individually failure to mitigate damages.

The underlying decision ordered that the employees be made whole for the loss of pay suffered as a result of Respondent's unfair labor practices. In computing the remedy, deductions are made from gross pay "for actual [interim] earnings of the worker, [and] also for losses which he willfully incurred" by a "clearly unjustifiable refusal to take desirable new employment."

Phelps-Dodge v. N.L.R.B., supra 313 U.S. at 197-200. These deductions for interim earnings are permitted "not so much [for] the minimization of damages as [for] the healthy policy of promoting production and employment." Id. at 199-200. Further, "[t]he cases are unanimous that the defense of willful loss of earnings is an affirmative defense, and that the burden is on the employer to prove the defense." N.L.R.B. v. Reynolds, 399 F.2d 668, 689 (6th Cir. 1968); N.L.R.B. v. Mooney Aircraft, Inc., supra 366 F.2d at 813.

It is the duty of the employer "to carry the burden of proof and point out what evidence in the record sustains . . . [its] claim, as against the presumptive proof of the board's

finding that the employees did not sustain willful losses." N.L.R.B. v. Reynolds, supra 299 F.2d at 670. The proof of the claimant's search for interim employment "is in no sense a part of the [General Counsel's] case." N.L.R.B. v. J.G. Boswell Co., 136 F.2d 585, 597 (9th Cir. 1943). As noted above, in this particular case the General Counsel did comply with the Board's non-binding policy that, after issuance of the backpay specification, it turned over to the Respondent all the factual information it obtained which was relevant to the computation of net backpay, including search for employment or availability for employment. See NLRB Case Handling Manual, Part 3, Compliance Proceedings, Section 10663.1-.3.

The basis for the employer being given the burden of demonstrating mitigation is because "it is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the backpay period." N.L.R.B. v. Miami Coca-Cola Bottling Co., supra 360 F.2d 575. One basis for mitigation is the demonstration that a discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take a desirable new employment." Phelps-Dodge Corporation v. N.L.R.B., supra 313 U.S. at 199-200. The burden is upon the employer to prove the necessary facts to establish such a willful loss of earnings. N.L.R.B. v. Mooney

Aircraft, Inc., 366 F.2d at 813. To meet this burden, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." Id. at 576. The employer fails to meet the burden by merely presenting evidence of lack of employee success in obtaining interim employment or a demonstration of low interim earnings. In determining if a discriminatee met his burden to mitigate, "he is held . . . only to reasonable exertions in this regard, not the highest standard of diligence."[9] N.L.R.B. v. Arduini Mfg. Co., supra 395 F.2d at 422-423. The basis for this determination is that success is not a measure of sufficiency of search for interim

employment for the law "only requires an honest good faith effort." N.L.R.B. v. Cashman Auto Company, 223 F.2d 832, 836 (C.A. 1, 1955). Also considered in determining the reasonableness of efforts are the employee's skills and qualifications, his age and the labor conditions in the area. Mastro Plastics Corp., 136 NLRB 1342, 1359 (1962).

In determining diligence, activity during the entire backpay period is considered as well as the entire record. Saginaw Aggregates, Inc., supra; Nickey Chevrolet Sales, Inc., supra. Any uncertainty in the evidence is to be resolved against the company as the wrongdoer. N.L.R.B. v. Miami Coca-Cola Bottling Company, supra; Southern Household Products-

Company, Inc., supra. See generally Aircraft and Helicopter Leasing and Sales, Inc., supra; Westin Hotels Corporation, 267 NLRB No. 58 (1983).

As Judge William J. Pannier noted in International Brotherhood of Electrical Workers, Local 401 (Stone & Webster Engineering Corp.), 266 NLRB 158 (1983) at slip op. p. 12:

> [I]t is a fundamental proposition of backpay doctrine that "there is no requirement that an employee wrongfully terminated must instantly seek new work . . . ." Keller Aluminum Chairs Southern, 171 NLRB 1252 at 1257 (1968). Accord: Saginaw Aggregates, Inc., 198 NLRB 598 (1972). For example, in Keller an employee who did not seek work during the two-week period immediately following the discrimination against him was held not to have failed to exercise due diligence where thereafter he sought the obligation imposed by the mitigation doctrine, i.e., sought interim employment. Similarly, an employee who quit one interim job to take another at a higher rate of pay was held not to have

> incurred a willful loss of earnings, as a result of having quit the first employer, when he was laid off by the second employer, absent "evidence that the employment with [the first interim employer] was 'permanent' while that with [the second interim employer] was specified to be 'temporary.'" Construction and General Laborers Local No. 1440 (Delbert A. Schultz and William R. Erdman and Southern Wisconsin Contractors Association; Martindale Builders, Inc., parties in interest), 243 NLRB 1169, 1172 (1979).

These general principles will be considered in determining the backpay entitlements of the individual claimants.

2. Economic Defenses

Respondent asserts that the economic situation was such that the claimants should have found interim employment readily throughout the entire backpay period. In support of this claim, Respondent introduced

evidence through H. Laurence Miller, Jr., a professor of economics at the University of Hawaii. Dr. Miller was found to be an expert as defined in the Federal Rules of Practice. He based his testimony on material provided to him almost, if not entirely, by Respondent. Dr. Miller's testimony is found not to be probative of job availability inasmuch as he admittedly could not attest to the truth and accuracy of the materials he reviewed. These materials did not adequately describe how they were compiled, the source of their statistics, the methodology employed to arrive at those statistics or the derivation of estimates for particular occupations or industries.

Certain of Dr. Miller's testimony was not placed into a useable context. For example, he stated there was a general increase in tourism but there was no evidence as to whether there was a concomitant increase in the tour bus business derivative from that general increase in tourism. There is evidence of record from the witnesses that the nature of tourism had changed, that many tourists are now traveling independently and not using tour buses. Thus there is no basis in the record to analogize an increase in tourism with an increase in job availability as a tour bus driver. Dr. Miller could not opine whether the individuals involved in this particular proceeding, based on the information he had, had made a

good faith job search consonant with the term as used in the field of economics, particularly those used in, Respondent's Exhibits S-2 and S-3, which are articles by two economists entitled "The Economics of Job Search: A Survey," reprints from a magazine entitled "Economic Inquiry," Volume XIV, June 1976, which describe optimum job search utilizing a compendium of sociological, psychological and economic factors. This definition of "job search" was not shown to be analogous to the applicable legal definition.

Application of these studies, whose accuracy and predicates he did not know and could not commend, led him to the general conclusion that some claimants were successful in

finding interim employment by chance, regardless of the fact that they were fulltime or parttime workers. He suspected, without any factual basis, that individual need for income might have had an impact on the intensity of job search, but he really did not know. Individual idiosyncracies or unique attributes, such as the ability to speak a foreign language, had some bearing on success. The individuals' personal attitudes, whether they were depressed or had a positive perception of self-worth, could affect intensity of job search. All these are factors that could increase chances for success. Thus, based on his testimony, mere chance could have been the primary attribute that led to success or lack thereof in finding

interim employment. In sum, there was no economic evidence given by Dr. Miller that would support a finding of failure to mitigate by any of the claimants.

3. Testimony of the Bus Companies

In further support of its position, Respondent elicited testimony from approximately seven bus companies about job availability. As noted in Respondent's brief, the bus companies did not retain job applications for a period of time sufficient to permit a determination that any of the claimants, who were not hired by these companies, did not apply for employment. These companies only retained job applications of individuals they hired. Where there was testimony that names of claimants

were unfamiliar or there was no recall of their applying for jobs, there was no reliable context in which to evaluate this information. For example, the mere passage of time would impair memory; a claimant could have telephoned and been told there were no jobs available, which could be construed by the bus company representative as failure to apply for a job; and the individual testifying might not have been the individual who was approached, either telephonically or in person with an inquiry from a claimant about a job.[10]

These bus company witnesses testified as to the number of drivers they hired during the backpay period. This testimony is not probative in determining job availability for in

almost all instances there was no showing of a direct correlation between the number of drivers hired per year and the number of applicants. There was no showing of the attributes the employer was seeking in drivers, such as foreign language skills or any other special factors. For example, Cheryl Kasamoto, of Robert's Hawaii, Inc., testified that in 1979 Robert's hired nine individuals who were both new employees and rehires. She does not know how many of the nine were rehires; they could have given preference to individuals who had previously worked for them. It was not ascertained if rehires are given preference as an industry or company practice. The figures proffered by

the different bus companies indicating the number of people hired were not placed in a context which would indicate job availability of a nature that is indicative of job availability or a willful failure to mitigate by any claimant.

In the instant proceeding, not one employer testified that any of the claimants refused an offer of employment nor did they represent that if any particular claimant had applied for work with them they would have been hired. There was no explanation as to why some of the claimants, who testified that they filed for employment with certain companies, were not hired. As Administrative Law Judge Schneider found in Firestone Synthetic Fibers and Textile Company,

Division of the Firestone Tire and Rubber Company, 207 NLRB 810 (1973):

> In this context, their testimony to the effect that they hired "X" number of employees during the backpay period is thus of no effect whatever with respect to the issue of whether [claimants] would have secured employment had [they] applied.

See further, Midwest Hanger Co., supra 221 NLRB at 911.

4. Analyses of Individual Claims

a. Simeon Agao, Jr.

The gross backpay listed in the backpay specification for this employee totals $60,813.09, covering a period from the day after his unlawful discharge on January 31, 1977 to October 21, 1980, which is approximately 2 weeks after a valid offer of reinstatement was sent to him, albeit not to his current address. Respondent does not question

the use of October 21, 1980 as the date for the cessation of Agao's backpay period. The backpay specification indicates that this claimant had net interim earnings including unquestioned expenses of $15 for mileage and telephone calls, for a total net backpay of $7,321.18.

Respondent avers that Agao did not sufficiently mitigate because he accepted, on March 5, 1977, a lower paying position as a fulltime driver with Robert's Hawaii Tours. At one time, the job became parttime due to renovations to Robert's facilities. Although he worked 8 hours a day as a parttime employee, he received substantially lower wages and benefits. Respondent asserts that since the job at Robert's was a

lower-paying position, Agao did not make an adequate job search for an equivalent position. Citing McCann Steel Co., 239 NLRB 1302 (1979), implementing the decision in McCann Steel v. N.L.R.B., 570 F.2d 652 (6th Cir. 1978); N.L.R.B. v. Madison Courier, Inc., 505 F.2d 391 (C.A.D.C. 1974). In McCann, Id. at 1302, it was found:

> In its decision [McCann Steel Company, Inc. v. N.L.R.B.], the Court stated (570 F.2d at 655):
>
> > We believe that substantially equivalent employment refers to the hours worked at the interim employer as well as the nature of the work there. Thus, Hinsley refused to accept "substantially equivalent employment" when he refused to work the same numbers of hours at his interim employer as he worked at McCann. This was a willful loss of earnings. The NLRB should calculate a constructive interim earnings figure based on the amount of

> pay Hinsley would have received at his interim employer had he always worked the same number of hours, including overtime, he averaged at McCann to the extent those hours were available at the interim employer. The NLRB should then deduct the new constructive interim earnings figure from the amount Hinsley would have earned at McCann in calculating the backpay period.

The instant case is clearly distinguishable. Agao testified credibly[11] and without controversion that he worked all the time available at Robert's, seeking all possible overtime, but that overtime was not compensated in the manner that it was at Rainbow. Respondent, apparently cognizant of the veracity of this testimony, next argues that Agao should have continued his job search after accepting the position at

Robert's since the terms and conditions of his employment at Robert's were not as favorable as they were at Rainbow and, therefore, he should have searched for more suitable work. Respondent, however, failed to demonstrate that the position at Robert's was significantly lower-paying or was so dangerous, distasteful or essentially different from his employment at Rainbow as to incur an obligation to seek other employment. Agao, a few days before accepting the Robert's position, was working VSP Tours and the earnings he made at VSP Tours were deducted as interim earnings. That VSP Tours was not listed on the forms he submitted to the Board detailing the nature and extent of his job search, does not

discredit him. Agao did, prior to commencement of this proceeding, report these earnings.

Respondent also argues that Agao did not make a diligent search between his discharge and his employment with VSP Tours and Robert's. Agao testified that in February 1977 he looked for work at the following bus companies: Hawaiian Discovery, Hawaiian Scenic, MTL--which is also called the Bus and is the public transportation company for the area--the Kauai Electric Company and Barking Sands Missile Base.

Respondent asserts these claimed employment inquiries are not truthful, arguing that Agao denied in his testimony making application to Barking Sands Missile Base. In fact,

Agao stated he did not make a written application at Barking Sands Missile Base, not that he did not apply in some other form such as by telephone or personal visit. Respondent produced a witness, the former operations manager for Greyhound, who did not recall Agao Applying for employment. This is not probative of failure to make a diligent job search. The hiatus in time alone could cause the failure of memory by either the Greyhound witness or Agao. Also, the Greyhound employee could have been on vacation or otherwise unavailable during February 1977. As noted above, any uncertainty is to be resolved against the Respondent as the wrongdoer; and since it has not been clearly shown that Agao failed to make

applications or inquire about job availability at the places he stated, it is found that, considering the record as a whole, he diligently sought other employment during the backpay period, being successful approximately one month after his discharge. Saginaw Aggregates, Inc., supra at 598; Nickey Chevrolet Sales, Inc., supra at 398; N.L.R.B. v. Miami Coca-Cola Bottling Co., supra at 569; Southern Household Products Company, Inc., supra at 881.

Respondent notes that Agao, as well as most of the other claimants, failed to complete their backpay forms submitted to the Board in a manner consistent with their testimony. Their testimony indicated their job searches were more extensive than the

forms indicated. As noted previously, the forms were sent to the claimants generally in April 1982. The extensive period of time between the actual events and the request to record them understandably resulted in an inability to recall when and where they made each job application.

Agao's failure to list initial VSP Tours on a form he supplied to the Board does not render him not credibile nor does in constitute a willful failure to provide information. This information was provided by Agao fully and freely from the inception of the trial. Poor record-keeping, as indicated above, is not a basis for denial of a claim in a backpay proceeding. This does not disqualify or toll the backpay

obligation. Employees are not disqualified from backpay merely because of poor record-keeping or uncertainty of memory. See Patrick F. Izzi, d/b/a Izzi Trucking Company, supra at 245.

Although Agao's interim earnings were less than he would have earned if he had not been wrongfully discharged, this is not probative of a failure to take suitable interim employment. Agao was the third in seniority at Respondent. He was unable for the period of time he worked for Robert's to attain comparable seniority. There was no showing by Respondent that there were job opportunities extant as a fulltime bus driver or other suitable interim employment where Agao could attain sufficient seniority to

fully mitigate Respondent's backpay liability. There is no showing in fact or in law that requires a discriminatee to fully mitigage a backpay obligation once a reasonably comparable job has been found. There is no showing that a more comparable job was availalbe given all the circumstances, including seniority. Further, there was no showing that the acceptance of a job at Robert's was the acceptance of significantly lower-paying work too soon after the discriminatory discharge, warranting a reduction in backpay on the grounds of a willfully incurred loss by accepting "an unsuitably" lower-paying position. N.L.R.B. v. Madison Courier, Inc., supra 572 F.2d at 1321. Agao accepted a fulltime

position at Robert's approximately one month after unsuccessfully searching for work, which became parttime at one point during the backpay period with the same number of hours assigned but at lower pay. The Robert's position was a similarly skilled position that compared favorably with Respondent's. It was not shown that Respondent did not pay higher than the prevailing wages and benefits. As noted in Aircraft and Helicopter Leasing and Sales, Inc., supra, 227 NLRB at 646 (1976):

> The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or low interim earnings; rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." [Citation omitted.]

In the case of Agao, his interim earnings were not shown to be significantly less than that which he earned at Respondent nor that which he could have earned at any other bus company considering the loss of seniority. Accordingly, this assertion by Respondent is found to be without merit.

Respondent's argument would place the claimants in the extremely difficult position of having to seek employment that is exactly equivalent, if not better in pay and working conditions, than that which they lost without a clear showing that there was an availability of such working situations in the Honolulu area. This argument overlooks the requirement that the claimant only seek

substantially equivalent positions. In fact, if one were to adopt Respondent's position, the discriminatee would not have to accept the Robert's job because it had more onerous terms and conditions of employment with less total remuneration. See Waukegan-North Chicago Transit Company et al., 235 NLRB 802 (1978), fn.4, citing the Richard W. Kaase Company, 162 NLRB 1320 (1967). Such a construction would result in much higher backpay awards and is contraindicated by established case law.

Respondent also claims that the backpay computations were in error because there was one notation on a social security form indicating that Agao earned approximately $28,823 in

1978 rather than the $14,411.63 indicated in the specification. Respondent never raised this issue at trial to clarify this conflict. The records of Robert's were available to Respondent, and were not used to controvert the accuracy of the specification. This failure to raise the issue at a time when explanation or clarification was possible cannot now support an attack on the specification. As previously stated, all doubts must be resolved against Respondent.

Agao did lose 2 or 3 days work during the bakcpay period because of a sky-diving injury. Also, after his first year of employment Agao took vacations, and did not look for additional employment during these

vacations. Since Agao was a fulltime employee of Respondent, he was entitled to vacation and health benefits. Respondent did not allege in its answer or amended answer to the specification that vacation pay was improperly added nor did it seek to amend its answer or otherwise raise the issue during the hearing. The same obtains for the 2 to 3 days when Agao was absent due to illness caused by the sky-diving accident. Respondent had full knowledge at the hearing yet made no timely request to amend and correct the specification. Additionally, there was no showing that these benefits during the interim period would not obtain if he had retained his employment with Respondent. See Florida Steel

Corporation and United Steelworkers of America, AFL-CIO, 234 NLRB 1089 (1978).

The term "backpay" encompasses not only wages but any accompanying pension, health, welfare or other fringe benefit payments or contributions which are integral parts of an employer's overall wage structure. See N.L.R.B. v. Strong, 393 U.S. 358-360, n. 4; N.L.R.B. v. Rice Lake Creamery Co., supra 365 F.2d at 892; Inland Steel Co., 77 NLRB 1, 4-5, n.13 (1948), and cases cited therein, enf. sub. nom. Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960. Since the backpay award is intended to make employees whole, it properly includes any fringe benefit payments or contributions that would normally

be afforded the affected employees along with their wages, including health and welfare payments and vacations. Under Respondent's benefit plan, Agao would have been paid for the days he was out ill or on vacation. It was not shown that Agao took vacations or sick leave that exceeded the reimbursable benefits[12] he would have received from Respondent save for his unlawful discharge. In fact, it is just such losses of time without pay that would have been covered save for the illegal discrimination that the Board provides for in its remedy. See, for example, N.L.R.B. v. Rice Lake Creamery Co., supra 365 F.2d at 888.

In sum, it is found that Agao made an honest and good faith successful

effort to find substantially equivalent employment. Accordingly, I conclude that Agao is entitled to net backpay in the amount of $7,321.18, exclusive of interest.

b. Michael Akamine

The backpay period for this claimant extends from the first quarter of 1977 through the third quarter of 1977 and General Counsel claims total net backpay of $1,663.18. From the fourth quarter of 1977 through 1980, Akamine had greater interim earnings than gross backpay.

In the report forms Akamine filed with the Board, he indicated that he applied for interim work at Hawaiian Scenic, Grey Line--also known as Hawaii Transportation, Pan American Airlines, Continental Airlines,

Polynesian Hospitality, Charley's, and Robert's Tours. During his testimony, Akamine confirmed these applications and further indicated that in February 1977 he applied to MTL. After approximately 5 weeks of searching for a job, Akamine commenced working for Robert's on or about March 2, 1977. Respondent, in its brief, admits that Akamine diligently searched for work; and in fact claims that he should be the standard against which all claimants are measured. Considering the facts and Respondent's admission, it is concluded that Akamine is entitled to net backpay in the amount of $1,663.18, exclusive of interest.

c. Miles Fonseca

Fonseca was employed by Respondent as a parttime driver. During this

employment, as well as currently, he worked fulltime as a fireman for the City and County of Honolulu. Net backpay is claimed for him from February 1, 1977 to October 14, 1980 in the amount of $18,421.76, which includes an additional $40 claimed for union dues expended to retain an interim job.

Respondent asserts that Fonseca should not receive any backpay and, if there is some entitlement, it should total $414.33 due to willful loss of earnings occasioned by his quitting after being rehired by Respondent in February 1977. Respondent also claims that Fonseca failed to search diligently for interim employment and willfully concealed earnings from various construction jobs and certain

tips. Further, Respondent claims that there were several periods of unavailability for work which are offsets.

It is undisputed that after his unlawful discharge, Fonseca returned to work, starting at the bottom of the parttime seniority list for, as a prerequisite to such reinstatement, he had to relinquish seniority. The question of whether this was reinstatement to a substantially equivalent job was not decided in the underlying unfair labor practice proceeding. However, the underlying proceeding did find Fonseca and the other discriminatees unconditionally offered to return to work February 2, 1977, and would have returned if Kolt had not told them they "would go to

the bottom of the seniority roster, i.e., the first full-time returnee would be No. 8 on the full-time seniority roster and the first part-time returnee would also be No. 8 on the part-time roster." Rainbow Tours, Inc., 241 NLRB 589 at 594. The underlying decision ordered Respondent to make all the employees whole "for any loss of earnings they may have suffered as a result of their discharges" and to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges." Id. at 598. Respondent clearly failed to comply with this order gby rehiring Fonseca, and

placing him at the bottom of the seniority list. There was no showing that during the term of Fonseca's reinstatement this shortcoming has been rectified. As noted in Sumco Mfg. Co., Inc. (Summit Grinding Company), 267 NLRB No. 62, slip op. p.11 (1983):

> . . . an offer of reinstatement to a job which is not substantially equivalent to that held prior to the discrimination does not toll backpay even when, as here, the employee accepts the offer, if the employee subsequently quits because of dissatisfaction with the inadequate reinstatement. J/B Industries, Inc., 245 NLRB 538 (1979) (employee worked 2 months at a non-equivalent job before quitting); Marlene Industries Corp., et al., 234 NLRB 285 (1978) (employee worked 2 or 3 weeks at the non-equivalent position); Glass Guard Industries, Inc., 227 NLRB 1140 (1977). Moreover, as the Board noted in Marlene Industries, supra at 291, the reinstatement of an employee without according her the seniority she had acquired prior to the discriminatory discharge

> does not satisfy Respondent's obligation to reinstate an employee to a substantially equivalent position.

There was no evidence that Respondent reinstated Fonseca to a substantially equivalent position; on the contrary, it admittedly required that he go to the bottom of the seniority list which clearly had an adverse impact on his choice of tour bus runs.

The above-quoted case does infer that the loss of seniority must have a casual nexus in the decision to quit. Respondent argues that Fonseca quit for other reasons. Fonseca applied for reemployment on February 2, 1977. It is uncontroverted that prior to such reinstatement, Fonseca was one of the five most senior parttime employees. Around early April 1977,

he resigned from Rainbow and started working for Charley's, another tour bus company.

Respondent argues that Fonseca quit because he was having problems with some drivers at Rainbow. The basis of this contention is that Gaylord Kolt, the stepson of Steve Kolt, chief operating officer of Respondent, went to a bar with Fonseca after work on a few occasions and, during one of these occasions, an individual who did not participate in the strike made a remark about Fonseca. Fonseca stated he wanted to kick the person's posterior but that the individual was too short. Respondent also notes that a comment made in 1982 on a form provided by the Board, wherein Fonseca stated he did

not want to work for Rainbow anymore, because it would create internal problems, indicates he quit because of such internal problems. Another statement on the form, that he was not interested in working for someone who wrongly fired him, was not addressed by Respondent. As further proof that Fonseca's reasons for quitting were other than reduction in seniority, Respondent argues that he never commented to Gaylord that he was dissatisfied with the dispatches he was ~~recei~~iving even though Gaylord was a dispatcher. Gaylord's initial description of himself as a dispatcher was, on cross-examination, clarified as being a dispatcher trainee who did not work those hours when the drivers were actually dispatched. The

dispatcher who actually handed out the jobs was not called to testify. Therefore, the requested inference has no basis.

Fonseca's testimony that he received less hours of work than other parttime drivers was based on his discussion with these other drivers, and the fact that the nature of the runs he received was different from those he received prior to his unlawful discharge. Prior to his discharge, he had longer runs, mostly tours; after reinstatement with the loss of seniority, he was not given "money runs." He considered "money runs" and foreign tourist pick-ups, which also have tours connected to them, as "money runs." Upon his return, he would be give 2-hours

transfers of tourists and baggage, which are not "money runs." Since he lived quite a distance from work, he informed an unnamed individual at the Company that if this was all that was available, it did not pay for his commuting from the north shore.

Pamela Talkin, the compliance officer who reviewed the figures, stated that although during one week after his reinstatement Fonseca did earn a substantial amount of money, in general he earned less after his reinstatement than he had been earning prior to his unlawful discharge. Talkin also noted, without refutation, that Fonseca had an unusually low number of hours in December, before his discharge, compared to the rest of his pre-discharge work history. A

review of the exhibits indicates that he generally earned substantially less after his reinstatement for those weeks reported although there were some fluctuations. There was no explanation as to why he had only one week of substantial earnings or why it was different from the other weeks. Respondent, who has the records, did not present an analysis of Fonseca's working record for a meaningful period prior to his discharge, and did not refute Fonseca's testimony that he received mostly transfers, or scrub runs, not regular money runs as he had in the past. Respondent's failure to explain its failure to extrapolate from its payroll records evidence substantiating their contention supports drawing an adverse

inference. The Company did not refute Fonseca's claim that he complained about his runs, just that he did not complain to Gaylord or his stepfather. There was no evidence indicating when the incident in the bar occurred in relation to his decision to quit. There is no basis for drawing an inference that this incident was the casual nexus for his resignation. Fonseca explained that his statement on the form was an analysis, reached in 1982 in response to the Company's 1980 offer of reinstatement, indicating his feeling of dissatisfaction over the Company's past treatment of him. He denied that the reason he left was because there were hard feelings regarding other employees or internal problems.

Fonseca's testimony is credited based on demeanor, inherent probabilities, and his demonstrated candor.

Respondent also argues that since Fonseca was simultaneously employed by Charley's Tours and Transportation at the time he left Rainbow, he actually quit to go to another job.[13] Fonseca denies that was the reason for his leaving. Charley's did not offer him much work at that time. In fact, when he was working at Charley's in the second quarter of 1978, he was also working for Greyhound. It is undisputed that the tour business at Charley's was very slow. Respondent did not introduce any evidence that indicated Fonseca was working so many hours at Charley's Tours that it operated as an inducement to him to

leave Rainbow or precluded him from working for both companies. Again Respondent has failed to present, as is its burden herein, evidence to support its claim that Fonseca quit for reasons not connected with his discriminatory reinstatement. Respondent's request that Fonseca's backpay specification be computed to reflect this quit and the amount he would have earned had he not quit, is found to be without merit.

As Respondent notes in its brief, quoting from N.L.R.B. v. Aycock, 277 F.2d 81 at 87 (5th Cir. 1967):

> Where a discriminatee takes an interim job with the discriminator, his quitting for reasons unconnected with the discrimination tolls the discriminator's backpay obligation to the extent of the interim wage; this is the same result as if the discriminatee had unjustifiedly quit a similar job with a third

party. In neither case does the employee have the unlimited option to leave an interim job without incurring a willful loss.

Assuming arguendo that this was comparable to any other interim employment, a claimant does not willfully incur a loss of earnings merely by voluntarily quitting interim employment, unless he does so without good reason. See N.L.R.B. v. Thomas J. Aycock Jr. d/b/a Vita Foods, ibid. at 87; N.L.R.B. v. Mastro Plastics Corp., supra 354 F.2d at 174, n.3; N.L.R.B. v. Madison Courier Inc., supra 472 F.2d at 1307. Respondent alleges that harassment by other employees was the basis for his leaving Respondent after his reinstatement. If this is true, the burden of proof is on the employer. See Marlene Industries Corp. v.

N.L.R.B., supra 440 F.2d at 674. The Respondent has failed in this burden. A discriminatee need not seek, accept or retain interim employment which is essentially different from his regular job, which is unsuitable to someone of his background, skill and experience, or which involves substantially more onerous conditions. Lozano Enterprises, 152 NLRB 258, 260 (1965), enf. 356 F.2d 483 (9th Cir. 1966).

As noted in Richard W. Kaase Company, supra 162 NLRB at 1320:

> A discriminatee does not have to accept a job with more onerous terms and conditions of employment. His obligation is to mitigate an employer's backpay liability only to the extent that the claimant accepts substantially equivalent employment.

Setting aside the loss of seniority, which in itself removes the job as being substantially equivalent, the

claimant is not required to subject himself to threats and more onerous working condition occasioned by harassment from co-workers. Respondent argues in its brief that "Fonseca did, however, tell Kolt he was having problems with some of the drivers at Rainbow." There is no indication that Respondent tried to alleviate these difficulties or otherwise abate the known onerous nature of the employment. See Midwest Hanger Co., supra 221 NLRB at 920.

Respondent infers that Fonseca had formed the intention not to accept reinstatement if offered by Respondent because of the difficulties he had with his co-workers and, thus, Respondent's backpay liability should be tolled. It is not unexpected or

unusual that Fonseca would have concern about untoward comments made to him by co-workers after a strike or would have ambiguous feelings toward an employer who unlawfully discharged him and reinstated him with a loss of seniority resulting in the lost facility to choose the runs he considered more desirable Fonseca's equivocal remarks do not demonstrate he irrevocably decided to decline a good faith offer of reinstatement. Respondent had within its power the right to test the propriety of this remedy by reinstating Fonseca with appropriate seniority. Respondent's election not to do so until October 1980 will not support a curtailment of Respondent's backpay liability to Fonseca based solely on his ambiguous

remarks. Accordingly, it is concluded that Fonseca's backpay continued to run after he left Respondent and that his quitting did not toll such entitlement for he did not receive a valid offer of reinstatement to substantially equivalent employment. There was no showing that any claimant exhibited unwillingness to return to work for Respondent prior to receiving a valid, good faith, unconditional offer of reinstatement.

There is an absence of any evidence of a cavalier proclivity by Fonseca while employed with Respondent or elsewhere to change jobs or to engage in disputes with co-workers or supervisors. If Respondent's contentions are true, then it requires a finding that Fonseca was goaded into

such conduct by the situation imposed on his resumed employment and, thus, the backpay is not tolled. See United Aircraft Corporation et al., 204 NLRB 1068 at 1078 (1973). Again, Respondent has failed to show that Fonseca willfully incurred a loss of earnings by quitting his employment with it in early April 1977 under the circumstances described in this proceeding and admitted by Respondent.

Finally, as noted above, where, as here, there is a question as to the motive, all questions must be resolved against the wrongdoer, Respondent. Consequently, even if one rejects the above finding that Fonseca quit because of a loss of seniority resulting in loss of earnings and loss remunerative assignment of runs, a

finding which Respondent's evidence failed to clearly refute, the fact that Respondent knew that Fonseca was being harassed by strike replacements or other coworkers who were given greater seniority than he and did nothing to mitigate it, is a substantially more onerous working condition than that existent in his previous position. He is not required to work under those conditions. See N.L.R.B. v. Miami Coca-Cola Bottling Company, supra 360 F.2d at 569. See further East Wind Enterprises, 268 NLRB No. 89, slip Op. p.4 (1984).

Respondent also argues that Fonseca's backpay should be tolled because he revealed interim earnings with Greyhound and from construction jobs only the week before the trail.

Recognizing that Board law finds revelation of information prior to commencement of trial not an indication of willful concealment, albeit shortly before such event, Respondent claims that since Fonseca was under subpoena at the time, it was not voluntarily submitted information. The "perfidious" nature of such late revelation, according to Respondent, is demonstrated by the fact that Fonseca described the Greyhound earnings as being off the books cash payments when in fact he received paychecks and tips. It is undisputed that Fonseca volunteered that he worked for Greyhound and Respondent was able to find documents indicating actual payments although there were no deductions from those

checks for pension, health and welfare payments, social security and otherwise.

Fonseca mischaracterized the nature of the payments and had no recollection of receiving paychecks, construing payments without deductions, normally required by law, to be off the books. This mischaracterization does not warrant a finding that he intentionally concealed employment or income from the Board and Respondent. There was no showing of perfidy or deception of a nature to be deterred by the tolling of backpay during those quarters in which such concealments occurred. American Navigation Co., supra 268 NLRB No. 62. Respondent had notice the week before commencement of

hearing that Fonseca had interim earnings from employment in casual construction and working for Greyhound. After initially examining Fonseca about these, as well as his other jobs and job-seeking efforts, Respondent had a 6-week hiatus in the trial to test the accuracy of these revelations. The Board has consistently recognized that individual claimants have difficulty in keeping accurate accounts of interim employment which they often hold for a short term, particularly where, as here, there was a lengthy backpay period. Despite these factors, the claimant did not fail to report the earnings. His estimates were, in the case of Greyhound, inaccurate. The estimates of his

earnings from the construction jobs used in the specification, was higher by $500 than Fonseca's estimate.

There is no showing that Fonseca's failure to put into the documents filed with the Board all the information he subsequently revealed to the Board agent at their first meeting was an attempt at guile. Fonseca did reveal the sources of income to the General Counsel and thence to the Respondent "before the weekend prior to the hearing, of both the income and of the failure to report it for tax and unemployment benefit purposes." There was no showing of deliberate concealment of earnings or any other improprieties that would hamper Respondent in the presentation of its case. There was

no motion for a continuance beyond the 6-week recess in the trial. Thus, there is no basis to disqualify Fonseca from recovering backpay due to his failure to complete the forms sent to him by the Board well after his unlawful discharge and well after the adjudication that such discharge was discriminatory. See Cumberland Farms Dairy of New York, Inc., 266 NLRB No. 166 (1983).

That Fonseca erred in his estimates as to how much he earned at Greyhound does not support a contention that there was a fraudulent withholding of information. It has long been recognized that such statements of interim earnings in circumstances such as these are only estimates and that errors in estimates

may tilt in either direction. The amount of backpay awarded requires only that it be based on reasonable conclusions. Again, Respondent has failed to show that there was an intentional concealment or fraudulent concealment of employment. See American Navigation Co., supra. This finding is buttressed by the undisputed evidence that Fonseca believed there were no records of these Greyhound earnings, and there were no records of his income from casual construction work and he could have concealed these earnings. Yet such income was revealed before the trial. See West Texas Utilities Company, Inc., 109 NLRB 936; Deena Artware, Inc., 112 NLRB 371, 375, enforcing 228 F.2d 871 (C.A. 6).

Fonseca's admission that he did not report some of the interim earnings he received on his tax returns is reprehensible; however, it is not the type of concealment that would toll backpay. There was no claim or contention by Respondent that Fonseca's failure to reveal income from the construction job on his taxes was a factor that would bar him from reinstatement. The candor in which he revealed such actions, cojoined with the observation of his demeanor and all the other relevant testimony convinces me that Fonseca was testifying truthfully to the best of his ability to recall the circumstances of his job search and the jobs he held during the backpay period. Fonseca was cognizant of his

family responsibilities which would also mitigate the gross backpay due him. See N.L.R.B. v. Southern Silk Mills, Inc., 242 F.2d 697 (C.A. 6, 1957), cert. den. 355 U.S. 821; United Aircraft Corporation and Local Lodge 1746, et al., supra 204 NLRB at 1068.

As was noted in Insta-Roto Inc., 267 NLRB No. 167 (1983), slip Op. pp. 4-5:

> Improper as this man's conduct may have been with respect to his statutory duty to pay his taxes like everybody else, I do not think his behavior in this respect sufficient reason to deprive him now of the make-whole remedy to which he is entitled under the Board's order . . . . There was no real deception against the Respondent, for the picture it was faced with at the hearing was correct in all respects. I do not mean to condone anybody's wrongdoing where payment of taxes is concerned, or even where honesty in their dealings with this administrative agency is concerned. But I think it is a relevant factor, all things

> considered, that (he) did, of his own volition, play it straight in the end.

Respondent argues that Fonseca failed to make "reasonable efforts to mitigate . . . loss of income." N.L.R.B. v. Arduini Mfg. Corp., supra 394 F.2d at 422. Again, this is an affirmative defense; the burden is on the employer to prove the necessary facts. N.L.R.B. v. Mooney Aircraft, Inc., supra 366 F.2d at 813; N.L.R.B. v. Mercy Peninsula Ambulance Services, 589 F.2d 1014, 1017 (9th Cir. 1979); N.L.R.B. v. Reynolds Box Co., 399 F.2d 688 (6th Cir. 1968). In assessing the reasonableness of efforts to mitigate loss of income, the entire circumstances surrounding the efforts to mitigate loss of income, the entire circumstances surrounding the effort

are to be considered. Fonseca was employed as a fulltime fire fighter. This fulltime employment usually did not require him to work 8 hours a day, 5 days a week. Rather, he worked 24-hour days 3 days a week. this schedule permitted more free time to seek and work at moonlighting jobs. However, the fact that he was fully employed did not permit him to seek fulltime employment elsewhere or to spend full time seeking interim employment.

Upon leaving Respondent's employ, Fonseca worked for Charley's Work for parttime employees at Charley's was admittedly extremely slow. Charley's called him only as needed and the need was infrequent.

In addition to working as a parttime employee of Greyhound as a "VIP" tour driver in 1977 and 1978, he sought employment at Hawaiian Scenic, Hawaiian Discovery Tours, Polynesian Adventure, Mini-Bus Tours of Hawaii, Moana Tours, Hawaii Transportation (also known as Grey Line), Robert's Tours, and Akamai Tours. Fonseca also sought employment in construction during 1979 and 1980. He is a journeyman carpenter who installed drywall prior to working for Rainbow. Akamai could not recall his seeking employment at their company and refuted his assertion they told him they did not hire firemen. Since there was no showing that the individual who testified was the individual Fonseca assertedly spoke

to, nor was there evidence that absolutely no one else interviewed employees or talked to employees, this refutation is not considered probative. Akamai Tours did not retain employment applications more than one year. Akamai did not have a policy, according to the individual who testified, against hiring firemen; however, Akamai Tours also was not shown to have had parttime openings at the time Fonseca said he applied. There could have been a lack of interest in hiring firemen because they could only work parttime. Accordingly, it is found that Respondent did not refute Fonseca's claim that he spoke to the individual at Akamai Tours and was informed they

were not interested in hiring a fireman.

Fonseca admittedly applied to the bus companies once only, based on his understanding that if they were interested they would call him. Whether this is a standard practice was not shown on the record. Accordingly, Fonseca's behavior in only applying once at these bus companies is not shown to be an unreasonable failure to mitigate. As the Board held in Cornwell Company, Inc., 171 NLRB 342 at 343 (1966):

> A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. Rather, the entire backpay period must be scrutinized to determine whether throughout that period there was,

> in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.

Fonseca also testified that he applied for parttime employment at Burns Security. Respondent notes that Burns' representative indicated the company had no record of such application and that such files go back to 1974. What Respondent failed to note was that the individual who testified for Burns, Mr. Smith, was not with the company during the backpay period, and did not know on which basis applications were kept on file. The basis for his surmise that all files go back to 1974 was not predicated on any personal first-hand knowledge or even hearsay statements by any other employee. This baseless

surmise does not support a finding that Fonseca did not apply to Burns. Currently Burns does not accept oral applications, but the witness could not testify from personal knowledge what the practice was during the backpay period. Accordingly, Fonseca's testimony that he applied at Burns was not adequately refuted.

Respondent asserts that during this period of time Fonseca was fired from Charley's, which should toll the backpay period. Although there is a letter indicating that he was discharged, pay statements reveal that he was still employed after this ostensible discharge. It appears that he was fighting a fire at a time when he should have reported for work, which led to the issuance of a letter;

however, since he received pay for work after that date, it also appears that some rapprochement was reached and he was not terminated. However, even assuming he was terminated, discharge under these circumstances has not been shown as a basis for tolling backpay. There was no showing that the discharge was occasioned by a willful loss of employment by Fonseca or involved an offense that demonstrated moral turpitude. Mastro Plastics Corp., 145 NLRB 1710 (1964); Barberton Plastics Products, Inc., 146 NLRB 393 (1967); George A. Angle, d/b/a Kansas Refined Helium Company, 252 NLRB 1156 (1980).

Fonseca had two periods of employment with Charley's. The first started near the end of his

reinstatement term with Rainbow or immediately thereafter until he commenced work in or about August 1977 with Greyhound Royal Hawaiian Transportation as a VIP limousine driver. That employment lasted until December 1978 when Greyhound ceased operations in Hawaii. He then recommenced working for Charley's until the third quarter of 1979 when they ceased to have any parttime work for him. He then stopped working at Charley's and began seeking construction work.

Since his employment at Charley's failed to produce any income because he was rarely, if ever, called to work, he was not obligated to retain such employment. As noted in

Waukegan-North Chicago Transit Company, supra 235 NLRB at 882, fn.4:

> A discriminatee does not have to accept a job with more onerous terms and conditions of employment. The obligation to mitigate an employer's backpay liability requires only that the claimant accept substantially equivalent employment. The Lakeland offer involved a wage rate less than one-half that which Hook enjoyed with Respondent. Acceptance of the Burns offer would have reduced his wages by approximately one-third. [Citation omitted.]

Fonseca worked as a carpenter and performed small construction jobs privately for individuals. He also hung gypsum board in two houses for a subcontractor in a subdivision in Hawaii Kai, earning $460 per house. He found the job through some cousins. He constructed a patio for a friend of a friend in Kaneohe which took about a week of his spare time.

He could not recall which quarter he engaged in that activity. The construction work was all in 1979 and 1980. He built a patio in Kailua. He helped build a house in Pupukea, but most of this work occurred after 1980. However, some of the proceeds from this work were included in interim earnings since he could not recall exactly when he helped the individual build the house. Work proceeded on the house as money was available and the house still is not finished. The house is depicted in Respondent's Exhibit C-29. He helped build the top floor. Fonseca estimated his earnings from construction based on the needs he experienced in paying tuition bills for his children. Fonseca's assertion

that he was experiencing financial difficulties is apparently substantiated by the testimony about his accounts at the Honolulu Fire Department Credit Union. These records were not moved into evidence. The testimony indicated that he had experienced a decrease in his cash balance and an increase in his loans.

Respondent argues that since Fonseca did not go through the union hiring hall, he did not make reasonable efforts in acquiring construction jobs. There was no testimony as to the availability of parttime work in hanging drywall during the backpay period from any official of the appropriate union. There was a dispute between the Carpenters and Latherers Unions

regarding who had authority to refer individuals to hang drywall. Also, Fonseca was not a member of the Latherers or Carpenters Unions at this time. There was no evidence regarding membership requirements in these unions as a prerequisite to referral. Accordingly, this argument is found to be without substance. It is undisputed that the construction industry was slow and there were not many jobs available. Fonseca called his uncle, Richard Fonseca, several times seeking his assistance. His uncle was formerly an official in the Latherers Union. Richard Fonseca's testimony regarding the advice he gave his nephew differs from the claimant's testimony. However, the differences could have been occasioned by the

jurisdictional dispute between the unions, and Richard Fonseca had no knowledge about the Carpenters' referral system. He did acknowledge that Miles Fonseca called him a lot looking for work. Both Richard and Miles Fonseca agreed that in Honolulu hiring is done by personal contact and over the phone. He stated you get a job if you know someone. Respondent failed to show that in this slow construction period, Fonseca's failure to find more parttime employment in this field was indicative of a failure to make a reasonably diligent job search.

Fonseca's self-employment in construction does not indicate lack of reasonable diligence. As the Court noted in N.L.R.B. v. Armstrong Tire &

Rubber Co., The Test Fleet Branch, 263 F.2d 680 (C.A. 5):

> Bona fide full self-employment will be regarded as complying with the obligation imposed upon a discharged employee to use reasonable diligence to keep himself in gainful employment . . . .

Respondent does not contend that Fonseca's self-employment in construction jobs was not bona fide employment. See further, W.C. Nabors, d/b/a W.C. Nabors Company, et al., 134 NLRB 1078 at 1092 (1961). Fonseca applied for work with all his former employers in this specialized field of hanging drywall. He named several of the companies to which he made application. No representatives from these companies were called by Respondent to refute Fonseca's assertion. That these companies were

subcontractors rather than general contractors is not shown to warrant an inference of lack of due diligence in job search for there is no indication that seeking work with subcontractors dealing with the special craft he was skilled in was not the proper way of seeking employment. That these companies were not listed on the forms submitted to the NLRB did not hamper Respondent in presenting its case, considering the length of this proceeding, including the recess, affording Respondent ample time to call witnesses who may potentially have shown mitigation or lack of diligence. The use of a "grapevine" in industries where the unrefuted evidence is that this is the usual method of gaining employment is

significant evidence of diligence. The Madison Courier, Inc., 202 NLRB 813.

Fonseca did not register with the State Employment Service for assistance in getting a parttime job. There was no showing that the State does lend its assistance to such registrants. Also, the failure to register with the State Employment Service does not show lack of reasonable efforts in seeking interim employment.

Fonseca did have interim earnings during each quarter in the backpay period. There were poor business conditions in the construction industry and an admitted change in operations in the tour bus industry which increased utilization of

mini-buses. This was not shown to have increased job availability for parttime or fulltime tour bus drivers. Several bus companies testified that they had openings during the backpay period but there was no specific showing that these jobs were available to Fonseca or that he failed to accept such employment. See Florence Printing Co. v. N.L.R.B., supra at 221-223, cert. den. 389 U.S. 840. There was no evidence of willful idleness or any other matters that overcome the presumption that Fonseca did not willfully incur any loss of earnings. N.L.R.B. v. Reynolds, supra at 688, held that the employer has the duty "to carry the burden of proof and to point out what evidence in the record sustains . . . [its] claim, as

against the presumptive proof of the Board's findings that the employees did not sustain willful losses." Id. at 670. I find that Respondent has failed to support its burden of proving that Fonseca failed to make a reasonably diligent effort to seek interim employment.

Respondent next asserts that certain offsets should be allowed to account for unavailability for work as indicated in the fire department's leave records. Such unavailability is attributable either to illness or vacations. It is undisputed that Respondent did not pay parttime drivers any vacation or sick leave benefits. Under normal circumstances involving fulltime employees where such benefits were not paid, the

backpay awards would deduct from the total those days that an employee is unavailable for work due to illness or vacations. However, in the case of Fonseca and the other parttime employees, a different question obtains. As the Court stated in N.L.R.B. v. Miami Coca-Cola Bottling Co., supra at 569:

> If an unlawfully discharged employee finds interim work, his earnings are deducted from gross backpay due. But the rule requiring deductions of interim earnings applies only to earnings during the hours when the employee would have been employed by the employer in question. Citing Phelps Dodge Corp. v. N.L.R.B., 219 NLRB 41, 313 U.S. 177, 198 and n.7, citing Pusey Maynes and Breish Co., 1 NLRB 482, 486 (1936).[14]

In this proceeding, gross backpay was calculated using actual earnings for the employees for a 12-week period immediately preceding their unlawful

discharges. Periods that the parttime workers were unavailable for work at Respondent due to illness or vacations could be included in these calculations. Since the propriety of such offsets must be shown by Respondent as part of its burden, Respondent must show that the vacation and sick leave reflected in the Fire Department records were matters not already reflected in gross backpay, and are proper deductions as occurring during hours when the employee would have worked for the Company. Respondent has failed to make any reference to what was included in the gross backpay of Fonseca and the other parttime claimants. To grant its request to make these deductions could result in the double counting of an

offset. As noted previously, all unanswered questions must be resolved against the wrongdoer. Respondent has failed to show these are proper offsets and were not already reflected in the specifications.

Respondent also failed to show that the sick leave taken by Fonseca from the Fire Department was of such a nature as would preclude him from working at interim employment as a bus driver. The exigencies of the job as a fireman were never explored nor were the requirements for sick leave sufficiently detailed as to warrant the requested analogy that illness sufficient to remove one from work as a fireman were of such a duration or nature as to warrant the assumption that he would also be unable to work

as a tour bus driver. Similarly, the vacations that Fonseca took were not shown to have taken him away from Oahu and he may have used those periods moonlighting, thereby increasing his interim earnings. These aspects were never explored. Consequently, it is concluded that under the facts of this case, even assuming that there is a potentially valid basis for deducting the days that he was ill or on vacation, such basis was not sufficiently established on the record to warrant the granting of the requested offsets.

In sum, considering all the circumstances, including Fonseca's interim employment in every quarter of the backpay period while working fulltime as a fireman, cojoined with

Respondent's failure to show accessibility of interim employment during the backpay period in the fields where he was skilled, and the failure to show that Fonseca should have known that he should apply more than once to each bus company he contacted or that such renewed application would increase his chances of employment, leaves no basis to determine how much Fonseca would have earned had he conducted himself otherwise. Therefore there is no basis to reduce the award to Fonseca. Accordingly, it is concluded that Fonseca is entitled to $18,421.76 in net backpay, including $40 for union dues, plus interest.

d. Yukio Iho

Iho was a fulltime driver with Respondent until the date of his unlawful discharge. Backpay is sought only for the first and third quarters of 1977, with total net backpay amounting to $1,687.57. The interim earnings calculations were based upon W-2 forms which were correlated with social security statements. His interim employer, Robert's Tours, did not have complete records. Respondent does not attack the accuracy of these documents. Respondent claims that since Iho did not obtain any interim employment until March 1977, "there is no corroborated evidence that he made any kind of diligent search during the intervening month of February." This assertion is confusing inasmuch as

Respondent has the burden of showing willful loss of earnings by failure to exercise reasonable efforts to secure interim employment.

Additionally, this assertion overlooks Iho's undisputed testimony that during February and March he sought employment at Gray Line, Polynesian Hospitality, Charley's Hawaiian Scenic, in fact practically all the tour bus companies, the MTL, the City bus line, the gas company and Pan American Airlines. Iho also searched for jobs using the classified sections in the newspaper, registered with the unemployment office and sought assistance from the Teamsters Union. He received an offer of employment at Charley's and was in his second day of training when he

received the offer of employment from Robert's. Inasmuch as Charley's did not guarantee 40 hours work per week, and Robert's did, he left Charley's and went to work for Robert's. Charley's did not pay him while he was in training. He was hired by Robert's because he spoke Japanese. As noted in Keller Aluminum Chairs Southern, supra at 1257:

> . . . There is no requirement that an employee wrongful terminated must instantly seek new work; it is only required that the record as a whole show that he exercised due diligence to this end. See Monroe Feed Store, 122 NLRB 1479, 1483.

Considering the number of places Iho applied for work and the fact that he accepted the first offers of employment received, there is nothing in the record to show that he did not use reasonable efforts to find interim

work. Accordingly, it is concluded that Iho is entitled to total net backpay of $1,687.57, exclusive of interest.

e. Lane Kaaiai

Kaaiai was employed by Respondent as a parttime driver prior to his unlawful termination in January 1977. He commenced his employment with Rainbow in 1973; terminated his employment there voluntarily, to start his own plant nursery, which failed; and returned to work for Rainbow until January 1977. The backpay period is asserted to be from the date of discharge to October 21, 1980, with a total net backpay of $20,312.52.

In its brief, Respondent argues that Kaaiai did not make a reasonably diligent search for suitable interim

employment; that he left the Island of Oahu to live on the Island of Hawaii in June 1978; that Hawaii is a location that has many fewer prospects for employment and, thus, relocating was a willful failure to seek suitable interim employment; and once having found such suitable interim employment with Islander U-Drive, he quit that job after one month, thus failing to prudently retain such employment subjecting him to an offset by the amount that he would have earned had he retained such job.

Kaaiai commenced his job search, for both fulltime and parttime employment, in February 1977, first seeking positions in the airline industry by applying at Hawaiian Airlines, Aloha Airlines, and Western

Airlines. He also applied for work as a fireman with the City and County of Honolulu. Respondent asserts, on page 44 of its brief, that the Fire Department indicated they had no records of employment applications for Kaaiai, which does not accurately reflect record evidence. This statement fails to recognize the unrefuted representation by the City and County of Honolulu that it does not keep records for unsuccessful candidates nor records of applications by name.

Kaaiai testified that he also applied to the telephone company, Gray Line, Hawaiian Scenic, Inter-Island, Hawaiian Transportation, Moana Tours, and Charley's. Inter-Island Resorts, according to Respondent, had no

records of an employment application filed by Kaaiai. Inter-Island is also known as Gray Line. Gray Line did have operations on the Island of Hawaii. According to the representative of Inter-Island, the secretary was supposed to purge the files of all applications that were over one year old. The absence of any applications for unsuccessful job applicant is probably the result of this regular purging operation. Kaaiai also sought employment at the Hawaiian State Employment Office, many employment services, a tour escort service, Hawaiian Electric Company and Hawaiian Telephone Company. He was qualified to seek employment as a heavy equipment operator, but did not seek employment in that field because

his brother and father, who worked for a construction company as heavy equipment operators on the Island of Oahu, told him that the job market in that industry was very poor.

Respondent argues that Kaaiai applied to approximately 27 companies during the 45-month backpay period. This fact was not clearly established on the record. Kaaiai indicated that he could not recall when he made the applications to the different companies. The evidence indicates that most of applications occurred before he secured employment at Islander U-Drive and started self-employment as a lei stand operator. Eventually he secured fulltime employment, which he still holds, at a restaurant. Therefore, it

appears that most of the applications were made within an 18-month period. Also, the places that were stated as potential employers were not represented to be a complete list, but all that he remembered years later. Further, the claimant sought employment by making telephone inquiries and answering advertisements in newspapers. Considering that hiatus in time from the actual attempts to find employment, the fact that the claimant also registered with several employment companies and the state, and that his efforts started almost immediately upon his unlawful discharge, it is found he exercised due diligence.

Kaaiai moved to the Island of Hawaii because his in-laws had a house

he and his wife could live in rent free.[15/] Kaaiai was unsuccessful in finding interim employment until after his move to the Big Island when he got a job with Inter-Island Hotel Operating Corporation, Islander U-Drive.

While on the Island of Hawaii, Kaaiai lived at two or three locations. He applied for work at Budget Rent A Car; Tropical Car Rental; Hotel Kamehameha; the Spindrifter Restaurant; Kona Surf; Lockheed in Hilo; Polynesian Pacific Cargo, an airline; Hilo Lei Company; Operating Engineers Local 3; the United States Postal Service; Polynesian Pacifica; and possibly Robert's Tours. Kaaiai stated those were all the places he could recall

and it was only after discussing his job search history with his wife that he remembered these efforts. Kaaiai further testified credibly that he reviewed job opportunities in the newspapers.

Kaaiai quit his job at Islander U-Drive after one month. During that one month, he earned $758.60. There is no showing as to whether this income included payments for overtime. Kaaiai quit because he was initially hired to work at the counter renting cars. The employer wanted him to work in excess of the agreed-upon 40 hours per week and required that he shuttle cars, wash the cars and in general, perform duties other than those to which he agreed when he accepted the employment.

Respondent asserts that Kaaiai's seeking employment initially at airlines on Oahu indicated a willful loss of income for he was not seeking suitable interim employment. Kaaiai was unable to remember the dates he applied at the various airline companies in relation to the time he applied at the listed bus companies on Oahu, or, if such attempts were in fact a premature lowering of sights or an otherwise improper failure to seek suitable interim employment with reasonable diligence. Respondent failed to specify why initially looking for employment at airline companies was a failure to seek suitable employment since a tour bus driver's knowledge of the island, and other skills, may have been highly

suitable for such employment. There was no showing what the wages would have been if such employment had been secured. Accordingly, Respondent did not support its allegation that Kaaiai failed to use reasonable efforts to secure comparable employment. See N.L.R.B. v. Mercy Peninsula Ambulance Service, supra at 1017-18.

Respondent also asserts that Kaaiai's move to the less urbanized Island of Hawaii constituted a willful loss of earnings. As noted in M Restaurants, Inc. v. N.L.R.B., 621 F.2d 336 at 338 (9th Cir. 1980):

> A discharged employee is not confined to the geographical area of former employment; he or she remains in the labor market by seeking work in any area with comparable employment opportunities. Citing N.L.R.B. v. Robert Haws Co., 403 F.2d 979, 981 (6th Cir. 1968).

Respondent failed to produce any evidence demonstrating that there were proportionately fewer opportunities for Kaaiai on the Island of Hawaii than on Oahu for an individual of Kaaiai's skill, education, age and experience. Kaaiai was able to secure employment on the Island of Hawaii.

Respondent next contends that Kaaiai willfully incurred loss of income by quitting his job at Islander U-Drive. General Counsel argues, on the other hand, that Respondent failed to show that his decision to quit amounted to willful avoidance of interim earnings at a job comparable to his employment at Respondent. No representative of Islander U-Drive was called to appear to testify. It is noted that the Inter Island Resorts

employment occurred in the third quarter of 1979, which was shortly after Kaaiai's arrival on the Island of Hawaii.

As found in Florida Steel Corporation and United Steel Workers of America, supra at 1092:

> . . . having obtained substantially equivalent suitable interim employment, a discriminatee must prudently retain such employment or run the risk of being subjected to an exclusion from gross backpay the amount that would have been earned had such job been retained. Knickerbocker Plastic Co., 132 NLRB 1209, 1212-6 (1961); Gary Aircraft Corporation, 211 NLRB 554, 557 (1974).

The initial question is whether Kaaiai's employment was suitable interim employment and, if so, was his reason for quitting excusable. Kaaiai asserts that he was being asked to work much longer periods of time than

he did for Respondent, and work more than 40 hours a week under terms and conditions that were not disclosed at the time he commenced such employment. However, there was no showing how much greater his work week was than 40 hours or the amount of time he had to devote to tasks other than working at the desk, his original assignment. There was no evidence that this employment created unacceptable disruptions in his private life. In fact, when he left this employment, he worked at a lei stand and then started his own lei stand where he worked for much less, yet devoted 10 to 12 hours a day, 7 days a week to this endeavor.

The Inter Island Resorts job paid substantially more per month than

Kaaiai earned while working for Respondent and, as noted above, there was no evidence as to whether he was paid for overtime, what his hourly rate was, or any other indication that it was not equivalent suitable interim employment. As noted by the Board in Knickerbocker Plastic, supra at 1212, "Persons who incur willful losses in interim earnings by quitting certain jobs must do so with compelling or justifying means." That the claimant may have worked for longer periods of time than he did for Respondent, albeit perhaps at a much higher wage, and performed some duties the nature and extent of which are unclear and were different than he originally assumed he would have to perform, do not appear to place a burden on the

claimant unsuited to a person of his skills and experience, or more onerous than those he would have been required to perform for the Respondent. He was willing to work longer hours 7 days a week in his own lei stand business. There is no showing that this job was an unsuitable way of earning a living that justified his quitting with no prospect for suitable substitute employment. The bare claim of stress caused by working an unspecified number of hours in excess of 40 hours per week, and performing some duties other than standing behind a counter, without further explanation, are insufficient to justify quitting. I find that Kaaiai's voluntary cessation of gainful employment, without other suitable employment in the offing, is

a willful loss of earnings for the period subsequent to his quitting. See further, Miami Coca-Cola Bottling, 151 NLRB 1701; Midwest Hanger Co., supra at 919, aff. in pertinent part sub nom. N.L.R.B. v. Midwest Hanger, 550 F.2d 1101 (8th Cir. 1977), cert. den. 434 U.S. 830; Shell Oil Company, 218 NLRB 87 (1975). As noted in Shell Oil Company, Id. at 88-89, and the cases cited therein, the circumstances relating to the quitting of a job because of distasteful job conditions have to be shown to be more than personal convenience, preference or accommodation rather than an inherent difficulty. Also, there was no showing that the job was not suitable because it was unprestigious, annoying, or created unacceptable

disruption to his private life. See Lozano Enterprises, supra at 258, and John S. Barnes Corporation, 205 NLRB 585 (1973).

His interim earnings will be offset by deeming he would have earned the amount he was earning at the time he quit for the remainder of the backpay period. Since he was earning wages at a monthly rate greater than he would have at Respondent during the backpay period, it is concluded that he is entitled to no backpay from the third quarter of 1979 to the end of the backpay period. The adjusted total net backpay due Kaaiai is $14,963.76, plus interest.

f. Eric Kama

General Counsel asserts Kama's total net backpay is $20,079.50,

including $200 he paid in mandatory union dues to retain interim employment. Kama worked fulltime for the City and County of Honolulu as a fireman. He was employed by Respondent as a parttime driver until he was discriminatorily discharged on January 31, 1977. Kama had worked for Rainbow about 3 months prior to his termination. Kama graduated from high school. He had 4 years of military experience, reaching the rank of sergeant. He retired from the Fire Department in 1981.

Kama's first application for interim employment was with Charley's in March 1977. He commenced employment at Charley's in early April 1977.[16/] Respondent asserts that this delay in applying for work, and

the fact that Charley's was the only job application he made, was a willful loss of earnings. As noted above, a claimant need not seek interim employment immediately after an unlawful discharge. Keller Aluminum Chairs Southern, supra at 1257. See Monroe Feed Store, 122 NLRB 1478, 1483.

There were no questions asked by any of the parties regarding Kama's failure to secure employment or make applications prior to March. As found in Cornwell Company, 171 NLRB 352 at 353 (1968):

> And if the theory asserted to prove the necessity for diminution of backpay was that [the claimant] was chargeable with willful loss of earnings through failure to look for suitable alternate employment, it was incumbent upon respondent to demonstrate by a fair preponderance of the evidence that [the claimant] did not make any reasonable efforts, when considered in light of all the

> surrounding circumstances, to seek out work that might have been available to her.

To determine reasonableness, the entire backpay period is to be considered and reasonableness is to be assessed considering existing conditions affecting the search for work such as age, area of residence, extent of employment opportunities open to that individual with his particular skill and experience. Respondent's failure to ascertain why Kama did not apply for any jobs prior to March 1977, and only sought work at Charley's, lead to the conclusion that it failed to bear its burden of proving this a willful loss of earnings. Kama may have had a reasonable expectation of reinstatement at Respondent.

The job at Charley's paid substantially less than Kama earned at Rainbow. As found in N.L.R.B. v. Southern Silk Mills, Inc., supra at 697, "after a reasonable period of time," claimants for backpay should be required to "lower their sights" and take whatever work was available in order to reduce Respondent's potential backpay liability. Kama's actions in this case, based on the record, have not been shown to be of the genre of a willful loss of earnings or an unreasonable lowering of sights.

As noted previously in this Decision, the business activity at Charley's diminished and, although Kama called in daily, there were no interim earnings as there was no work available during the third and fourth

quarters of 1977 and the second and third quarters of 1978. Kama admitted that he noticed and diminution of work during these periods. He acknowledged that Charley's did not have sufficient work to keep the fulltime employees engaged for 40 hours a week. During this time he admitted failing to look for any interim employment in 1977 during these periods of layoff. He only filled out an application and took an orientation tour at Polynesian Adventure. On January 11, 1980, Kama applied for work with Robert's Tours and was hired. For the remainder of the backpay period, he was retained by Robert's as a parttime employee on an on-call basis. Respondent argues that Kama had a duty during these long layoffs to seek additional work, and

his failure to do so, having sought employment at one other tour company in 1978, constituted a willful loss of earnings.

By Kama's own admission, he saw that there was insufficient business at Charley's to produce work for parttime employees and he did not have a reasonable expectation of earning any income. Yet he did not make any effort to search for parttime work in 1977 and made only one application in 1978 to another tour bus company. Although Kama reached retirement age from the Fire Department in 1981, it was not shown or asserted that his age, area of residence, particular job skills and experience were such as to render seeking employment at only one other bus company during four quarters

of unemployment a reasonable effort to secure interim employment. Kama's admission that he foresaw the lack of work obviates a finding that he reasonably anticipated being recalled to work in the near future. Therefore, I will disallow his claim for backpay for the third and fourth quarters of 1977 in the amount of $1,885.78 for each quarter, and for the second and third quarters of 1978 in the amounts of $1,933.42 and $1,947.95, respectively. As noted in Cornwell Company, supra at 343, backpay can be tolled for any part of the backpay period where it is found that the claimant did not make a reasonable effort to secure interim employment. Thus, although the entire backpay period as a whole is utilized

in determining reasonableness of job search, where certain periods of such backpay time span demonstrate a willful failure, backpay should only be tolled for those periods. See Knickerbocker Plastic, supra at 1217.

Respondent asserts that those days Kama was shown to have been ill or on vacation on the Fire Department records should be considered offsets. As noted above, Respondent has the of showing that Kama's vacations or illnesses interfered with his search for work or prevented him from accepting available employment. See generally Construction and General Laborers Local No. 1440, supra at 1169. As Respondent notes, the records indicate that Kama took vacations from June 2-15, 1977,

September 17-22, 1977, November 11-15, 1977, June 6-28, 1978, October 12-14, 1978, February 24-26, 1979, August 24-28, 1980. Kama, as a parttime employee of Rainbow, was not entitled to vacation or sick leave. Kama testified that he usually spends one week on vacation each year with his parents, but further testified that he only went to the Big Island where his parents reside two times during the backpay period. This matter was never clarified on the record. It was Respondent's obligation to demonstrate willful absenteeism during the backpay period and the failure to clarify the record does not warrant the assumption that Kama vacationed on the Island of Hawaii each year of the backpay period. Kama testified that he was

only off the Island of Oahu twice during his vacations. He normally took his vacation during those periods when there was the greatest activity in his interim employment. The record shows that he spent one week during the backpay period in October 1977 on the Island of Hawaii. There was no showing that he looked for interim parttime employment while on the Island of Hawaii. Accordingly, it is found that this one-week period in 1977 was a temporary removal from the labor market during which he lost his eligibility to receive backpay. See Gary Aircraft Corp., supra at 557. Since this trip to Hawaii occurred during a period of time when backpay was tolled, there shall be no additional offset.

Kama's testimony was unclear as to when he took a second vacation on the Island of Hawaii. He could not recall when he made the visits to Hawaii, but he did go in 1979 for a weekend when his niece got married. This trip to the Island of Hawaii is found to be a temporary removal from the labor market, for which he lost his eligibility to receive backpay. One week will be offset during the first quarter of 1979 since Kama testified he usually went for a week and since the exact extent of this sojourn is unknown, the usual one-week vacation, will be assessed. Thus, Respondent's backpay liability should be reduced by $43.22 in the first quarter of 1979.

As for those periods Kama was on sick leave from the Fire Department,

as noted above in the discussion relating to Fonseca, sick leave offsets for short periods of time must be shown to be warranted. Respondent has failed to meet this burden of proof. Recognizing that sick leave ordinarily would raise the inference of temporary unavailability for interim employment, in this particular case where actual earnings were utilized in determining gross backpay, there must be a showing that the requested offsets would not result in double counting. Respondent's failure to indicate that such illnesses indisposed the individual from performing his interim job, or that this factor was not already considered in the gross backpay calculations because the 12-week period may have

included short periods of illness, requires a finding that such deductions have not been shown to be warranted.[17]

Respondent also raised as an affirmative defense in the transcript its lack of access to subpoenaed bank records, asserting this precluded presentation of its case. Kama was shown a joint savings account signature card for First Federal Savings and Loan for Account No. 96428. Respondent's possession of such records to try to refresh Kama's recollection substantiates that it received some bank records, as found above. Respondent did not detail, as noted above, which bank records it had received. Respondent further asked Kama questions about his mortgage

payments and referred to material which appeared to be mortgage records. These documents were not identified nor placed in the record. It is undisputable, based on the record evidence, at transcript page 1491, that Respondent had bank records for some of the claimants that were voluntarily provided by some banks. This defense has been found to be without merit.

In sum, it is found Kama should be reimbursed net backpay of $9,166.14, plus interest, as shown in Appendix F.

g. Ralph Kaui

Kaui was a fulltime bus driver for Respondent and the second most senior driver prior to his unlawful termination on or about January 31, 1977. Total net backpay is claimed in

the amount of $20,286.83. This claim includes undisputed expenses for union dues and mileage.

Respondent asserts several affirmative defenses seeking to reduce Kaui's total net backpay claim to the amount of $3,555.64. The first assertion in Respondent's brief is that Kaui failed to make a reasonably adequate job search for he only applied at MTL Bus Line, prior to commencing work as a parttime employee for Hawaiian Transportation, an affiliate of Inter Island Resorts. This assertion overlooks the undisputed evidence that Kaui worked as a limousine driver for VSP Tours after he applied for work as a bus driver with MTL and registered with the State of Hawaii Unemployment

Service. Since work at VSP did not produce adequate income, he began work for Hawaiian Transportation in February 1977.

Respondent argues that Kaui's net backpay should be reduced for he accepted a parttime job in February without having made an adequate job search for fulltime employment. Citing McCann Steel Co. v. N.L.R.B., supra at 652, and N.L.R.B. v. Madison Courier Inc., supra at 391. The Board and courts are cognizant that discriminatees may, and sometimes are, required to seek and accept "other suitable employment at somewhat lower rates of pay." N.L.R.B. v. Madison Courier Inc., supra at 405:

> [T]here is some danger in withholding backpay from a claimant who accepts a lower paying job without making a

> completely adequate search for higher paying work. If he accepts the lower paying job too soon, he may be held to have incurred a willful loss of income by accepting an unsuitable position. But if he turns down the lower paying job, he may be held to have incurred a willful loss of earnings by failing to "lower his sights." Consequently, doubts in this area should be resolved in favor of the claimant.

See also, N.L.R.B. v. Miami Coca-Cola Bottling Co., supra at 575. Thus, the initial question is whether other suitable employment was sought for a reasonable period of time after the unlawful discharge. As the Court held in McCann Steel Co. v. N.L.R.B., supra at 652, "suitable or substantially equivalent employment" refers to the nature of the work as well as the number of hours worked.

Initially, it is noted that Respondent did not show that the job

with Hawaiian Transportation was clearly unsuitable. The evidence clearly demonstrates that many of the jobs in the tour bus industry on the Island of Oahu are filled by word of mouth recommendations. Thus, analogizing Kaui's situation to those who were able to obtain fulltime jobs through word of mouth recommendations does not establish the availability of such jobs for this claimant. Akamine and Iho both found fulltime jobs through recommendations and both had Japanese language skills which may have been the basis for their obtaining that employment almost immediately after their unlawful discharges. Unrefuted is Kaui's testimony that it is the usual practice in the tour bus industry to

commence employment at the bottom as a parttime driver and work up through the different categories which are: parttime driver, junior driver and fulltime driver. Also unrefuted and unquestioned was Kaui's assertion that all three driver categories are paid the same rate, and that it is possible for a parttime driver to call in and work 6 or 7 days a week, earning as much or more than fulltime drivers.

Kaui was discharged by Rainbow while working as a tour bus driver and found interim employment as a bus driver, albeit parttime and lower in seniority. Under the facts of this case, Respondent has failed to show clearly that Kaui failed to accept a suitable position. There was no demonstration that any other available

job would have been more appropriate for Kaui, given his particular job skills or lack of a particular language skill. There was no evidence that he was offered a position with a tour bus company as a fulltime employee which he failed to accept. Accordingly, this assertion is found to be without merit.

Kaui had to be available for work at Hawaiian Transportation 6 days a week and accepted all work offered. The number of days he had to be available for work may have limited his opportunities to seek other employment. After Hawaiian Transportation temporarily laid him off, he began looking for work elsewhere. Kaui eventually found work at Hawaiian Scenic Tours in December

1977 and continued working for that company until it ceased operations in December 1980. Kaui then went back to work at Inter Island Resorts (a/k/a Hawaiian Transportation Company), which eventually was called Gray Line Tours. In December 1980 he left Gray Line to take a fulltime position with the City and County of Honolulu in the Parks and Recreation Department. During the times when he was laid off by the bus companies, he registered for work at the State Employment Service, went to the Teamsters Union and made applications at Pepsi-Cola as a truck driver, a trucking company called CPM & F, the Waikiki Trade Center, Hawaiian Airlines, Hawaiian Telephone, Young Laundry as a truck driver and Foremost Dairies. He often

referred to the computer listing of jobs at the State Employment Office since he lived nearby, and telephoned in response to jobs advertised in the want ad section of the newspaper.

These actions are found to constitute a reasonably diligent search for interim employment. That the claimant experienced several periods of layoff due to lack of business supports his claim that there was no more suitable employment available. At one juncture, while working for Hawaiian Scenic, he was elevated to the position of fulltime driver and then, due to lack of business, reduced to a junior position. These facts refute Respondent's contention that Kaui could have found a fulltime position

or that the failure to find such a job indicates lack of diligence.

There was no evidence that Kaui willfully worked fewer hours than offered during the backpay period. Respondent argues that in a personnel action form, dated April 25, 1980, Hawaiian Scenic Tours changed Kaui's position form regular driver to junior driver effective April 28, 1980, and surmised that this was probably done because he failed to make himself available to work. The basis for this surmise is unexplained in the brief. However, it is noted that in the same exhibit, Respondent's Exhibit G-16, there is an employment status report which shows that Kaui last worked June 26, 1980 and was temporarily laid off July 2, 1980 for lack of work. Thus,

Respondent's inference appears effectively refuted by its own exhibit demonstrating that shortly after his change in status, Kaui was laid off for lack of work. The personnel action form also indicated that there was a reduction in the number of hours he worked since his change of status, further supporting a conclusion that he was made a junior driver due to lack of work and his seniority ranking with the company.

Apparently after the backpay period ended, Kaui did not make himself available for work and was discharged from the Hawaiian Scenic Bus Company on November 24, 1980. The dismissal notice stated the basis for the action was that the employee "did not make self available for work."

There was no testimony as to what that particular action meant or the circumstances surrounding it. This evidence regarding events subsequent to the backpay period was not shown to be reflective of any actions during the backpay period which would warrant the drawing any adverse inference. There is no contention that he quit.

Discharge from interim employment is not a willful loss of earnings. Even assuming arguendo that Kaui was shown to have been responsible for his discharge subsequent to the termination of the backpay period, this finding did not demonstrate willful loss of earnings during the backpay period. Respondent's exhibit demonstrates that Kaui's hours were greatly reduced. This diminution in

work rendered his employment not substantially equivalent to his job at Rainbow, and Respondent did not show that he had incurred an obligation to retain such employment. The greatly reduced hours the record shows Kaui worked could arguably demonstrate that the job was unsuitable and thus he had no obligation to retain it. See Keller Aluminum Chairs Southern, Inc., supra at 1252; Waukegan-North Chicago Transit Company, supra at 802, which states:

> A discriminatee does not have to accept a job with more onerous terms and conditions of employment. The obligation to mitigate an employer's backpay liability requires only that the claimant accept such substantially equivalent employment. The Lakeland offer involved a wage rate less than one-half that which Hook enjoyed with respondent. Acceptance of the Burns offer would have reduced his wages by approximately one-third. In

> addition, with respect to the weekend work required by Burns, the Board held that a discriminatee is not required to accept employment on a different shift from a job from which he is discharged. Richard W. Kaase Company, 162 NLRB 1320 (1967).

The individual who had a regular schedule of work, as Kaui did with Respondent, similarly would not have to retain employment where he had to be available 6 days a week and only received a few days work per pay period. A failure to retain such a job would not be construed as a willful loss of income.

Respondent notes that several pay stubs were missing from Kaui's records. Kaui's wife kept most of his pay stubs and prepared their income tax forms. Kaui was assigned to work for two movie companies and his earnings records differed from his

recollection. This matter was never clarified and there was no official from the employer, Hawaiian Scenic, or its affiliates, either ARA or Leeward Bus Company, that would indicate that his poor recollection was otherwise indicative of an intent to deceive or defraud. An equally reasonable explanation is that one of the jobs was compensated in a regular paycheck from his employee, Hawaiian Scenic, and the other was just not properly recalled and did pay substantially less than he remembered. Other missing pay stubs are considered to be subject to the same reasoning applied to the claimants' lack of accurate or complete record keeping, discussed above. These missing stubs, as well as the failure to keep accurate or

complete records, has not been shown to be of such a nature as to abrogate or reduce Respondent's obligations to this or any of the other claimants.

Respondent asserts that various vacations and days off for illness should be offsets, with the exception of a period from May 15 to August 31, 1978. On May 15, Kaui broke his clavicle in a motorcycle accident and was disabled until September 1, 1978. Respondent's Exhibit G-11, page 24, shows that he received some reimbursement in the amount of $1,864.80 for the period May 22, 1978 to September 1, 1978. The record copy of this document does not note the issuer of this payment nor the purpose of the payment. Respondent argues that it was a temporary disability

payment and, as such, should be credited as an interim earning. Respondent did not indicate who was the issuer of the payment nor did it get an explanation of the nature of this payment. This may have been an insurance benefit which would have been encompassed in lost fringe benefits or collateral benefits not properly offset. Medline Industries, Inc., 261 NLRB 1324 (1982).

Vacations and illnesses have not been shown to be proper offsets. The term "backpay" is a term of art encompassing not only wages but also any accompanying pension, health, welfare, or similar fringe benefit payments or contributions which have long been characterized as integral parts of the employer's overall wage

structure. See N.L.R.B. v. Strong, supra at 358-360, n.4; N.L.R.B. v. Rice Lake Creamery Co., supra at 892; Inland Steel Co., supra at 4-5, n.13, and cases cited, enf. sub nom. Inland Steel v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960. Inasmuch as backpay is intended to make employees whole, it is well established that it may properly include any fringe benefit payments or contributions which, but for the unfair labor practice found in the underlying proceeding, would have been earned or garnered by the affected employee along with their wages. N.L.R.B. v. Strong, id. Respondent provided vacation and sick leave benefits to fulltime employees, including Kaui. Respondent has failed

to demonstrate that, except for the disability period occasioned by the motorcycle accident, the vacation and sick days this claimant took during the backpay period would not have been included in his benefits if he had remained an employee of Rainbow. Accordingly, Respondent's request that the days Kaui was on vacation or sick leave, with the noted exception, be deducted from his net backpay has not been shown to have merit and is denied.

As to the monies received from the motorcycle accident, the Board noted in John J. Canova, d/b/a Canova Moving & Storage Co., 261 NLRB 639, 640 (1982), aff. 708 F.2d 1498 (1983):

> A controversy has arisen over how much, if any, of this sum may be offset as interim earnings from backpay otherwise due Phillips. As the Administrative Law Judge correctly observed, the Board, in

> American Manufacturing Company of Texas, [167 NLRB 520 (1967).] held that the workers' compensation payments are deductible insofar as they constitute a payment for wages lost by a discriminatee during a backpay period; but, to the extent that such payments constitute reparation for physical damage suffered, they are, as a collateral benefit unrelated to wages, excluded from the computation of interim earnings.

Respondent has failed to bear its burden of proof in showing the nature of this payment. There was no evidence the payment constituted a reparation for physical damage suffered or was, as claimed, a temporary disability payment. Further, Respondent failed to show how, under the applicable law of the State of Hawaii such payments are usually treated.

However, as found in the Canova case, id., absent unusual

circumstances not here present, an employer is not liable for backpay during periods that an improperly discharged employee is unavailable for work due to a non-work related disability. See American Manufacturing Co., Id. at 522. There was no indication that the disability in this case was other than temporary and since the doctor certified a return to work by September 1, 1978, the record evidence indicates that Kaui was temporarily disabled and unavailable for work from May 15 to September 1, 1978. Accordingly, backpay will not be awarded for this period. Respondent argues that the number of days Kaui was disabled should be multiplied by his daily wage to determine the offset. However, to

do so would permit an offset greatly in excess of the gross backpay for the same period. The amount of the offset for this period of disability will be computed on a proportional basis, or one half of the gross pay for the second quarter and one-third the gross pay for the third quarter of 1978. The total net pay is reduced to $17,251.24, as reflected in Appendix G, plus interest.

h. James Louis

The claimed backpay period for James Louis runs from the time of his unlawful termination, February 1, 1977 until July 1, 1977. The total net backpay claimed is $2,952.17. The backpay period for Louis was cut off as of July 1, 1977 because it became apparent to Counsel for General

Counsel that Louis was devoting so much of his time to the pursuit of his own business that from July 1 forward that he was unavailable for work as a parttime employee. Louis had worked for Respondent as a parttime employee while retaining fulltime employment with the City and County of Honolulu in its refuse department. Like Fonseca, Louis returned to work at Rainbow Tours after the strike ended.

The Respondent has several affirmative defenses. Initially, Respondent notes that Louis returned to Rainbow as a parttime driver after his unlawful discharge, arguing Louis' resignation on April 17, 1977 from Rainbow's employ was essentially voluntary, was not followed by a diligent job search or with the

prospect of other similar employment, constituting a willful loss of income. It is uncontroverted that Respondent failed to reinstate Louis under terms and conditions consonant with the Board's order in the underlying proceeding. When Louis returned to Rainbow's employ, he was admittedly informed by Kolt that he was to be treated like a new driver, start from the bottom of the seniority list, and be subjected to an evaluation course to qualify as a tour bus driver. As noted in discussing Fonseca's reinstatement and subsequent resignation from employment at Rainbow, improper reinstatement does not toll the running of the backpay period. See S.E. Nichols of Ohio, Inc., supra at 1, and cases cited

therein. Also similar to Fonseca, it is found that Louis was constructively discharged. Contrary to Respondent's assertion that Board Agent Talkin determined, after investigation, that Louis' hours were no different after his reinstatement than before, she testified that such similarity only existed as to one month, March 1977.[18/] As Respondent's Exhibit H-2 demonstrates, there was a general dimunition in Louis' income after his reinstatement. Also uncontroverted is Louis' testimony that he left because there were cliques,[19] his hours of employment began diminishing, his income dropped, he was given less desirable assignments and less desirable equipment. Inasmuch as these changes in income and job

assignments are directly attributable to his unlawful discharge, it is concluded that his leaving Respondent's employ without having another job was not a willful loss of earnings.

It is noted that Louis had a Class III State of Hawaii drivers license which did not qualify him to drive tour buses. It is unclear as to whether Rainbow knew that he did not qualify as a tour bus driver under the licensing procedures of the State. In an application Louis filed with Respondent, he stated he had a Class IV license. There is no indication as to whether Respondent required its drivers to present the proper license on a periodic basis for their review to ensure fitness to drive. Louis'

Class III license only authorized him to drive 12-passenger vans. He always had a Class III license. There was no record evidence as to whether the Company had knowledge of this falsehood or lack of proper qualifications during the backpay period. There is no basis to find those actions bar recovery of backpay. Louis started his employment with Rainbow in 1967 or 1968 and was one of the most senior parttime drivers. This failure to have the proper drivers license has not been shown to be relevant to any of the issues in this proceeding, save credibility. It is incredible that an individual drove a bus for approximately 10 years without the proper license and it is equally

incredible that a company employed such an individual without knowing he did not have a proper license. Respondent did not claim to have knowledge of this failure during the backpay period or at any other time which would warrant tolling backpay.

Respondent next asserts that after Louis left Rainbow's employ, he failed to engage in a reasonably diligent job search which would act as a bar to receipt of backpay. Louis applied for work at two gas stations and Freeman Security, as well as attempting to start his own business. Louis was unclear when he applied for jobs with other potential employers, including Hawaiian Holidays, Diamond Parking, American Express, Liberty House, McInerny, and B & C Trucking, while

trying to start his own businesses, including a nursery business which would rent plants to various businesses, a lunch truck and a used car selling service called Sell It Yourself. Respondent indicates that Louis had no experience in running a business and his inept efforts to become self-employed should not be construed as a diligent job search. As found in Heinrich Motors, Inc., 166 NLRB 783 (1967), "That self-employment is an adequate and proper way for the employee to attempt to mitigate loss of wages hardly requires citation." Louis' inexperience in running his own business does not alter established law. Louis testified that he had partners in these endeavors. Respondent failed to ascertain who

these partners were or whether they had requisite experience to increases his chances of success. Respondent thus has failed to bear its burden of proof.

Respondent claims that Louis was placed on leave without pay from his job at the refuse department between February and April 1977 because he was suffering from psychological stress. This claim is not a clear reflection of the record. The records of the City and County of Honolulu indicate that Louis was placed on leave without pay because he failed to provide a chest X-ray. See Respondent's Exhibit H-21. It is noted that Louis continued working for Respondent during this time. There was no indication that he was suffering from

psychological stress or other illness rendering him unfit to drive a tour bus. The records of the City indicate that his failure was solely based on his not meeting medical requirements prescribed by the City. As Deputy Corporation Counsel for the City and County of Honolulu Charlotte Duarte testified, at page 659 of the transcript, the City stopped Louis from driving but this would not preclude him from driving on another job as long as the employer was not the City. Although Louis mentioned that he suffered from depression due to family problems and financial difficulties, there was no showing that such depression occurred during the two quarters of his backpay period or was such quality and nature as to

preclude him from working for Respondent or any other employer. Louis subsequently returned to driving for the City and County of Honolulu. The record evidence does not show that he was unable to work at interim employment during the backpay period. Consequently, it is concluded that Respondent has failed to bear its burden that his admitted psychological stress affected his availability for work during the backpay period.

Respondent contends that backpay should not accrue for those days that Louis took sick leave, funeral leave, and vacation time. As to vacation time, there was no showing that he was unavailable for work with Respondent when he took vacation time from his fulltime employment with the City and

County of Honolulu. The sick leave he took during February, March and April, while still employed with Respondent, was not shown by Respondent to have impaired or prevented his working for them. The only interim earnings recorded during the backpay period were with Rainbow, and Rainbow would have all leave records indicating whether he did or did not work those days. During the backpay period when he was no longer employed by Rainbow, Louis took sick leave from the refuse department May 17-19 and on June 21 for an industrial injury. As indicated above, Respondent failed to show whether occasional sick days were or were not already included in the gross backpay calculations. Respondent has the obligation to prove

mitigation and must initially show whether such sick leave is a proper offset under the circumstances of this case, and not a double counting. It has failed to so.

Louis' forms were returned to the NLRB blank, failing to mention some job applications he later testified about. This action does not show a failure to conduct a reasonably diligent job search. Respondent had all the information available to it prior to its examination of Louis and there was no claim at the time of such examination that further time was needed in order to prepare its case. Louis exhibited confusion as a witness, admitting at the time that the documents were submitted to him for completion that he suffered from a

depression which impacted adversely on his ability to complete them accurately, and there were several patent errors in the portions he did fill out, including the claim that he worked for Rainbow through September 1977. This confusion does not constitute a basis for offsets. Louis applied to tour-related companies such as American Express and Hawaiian Hospitality. He also sought jobs in related fields such as driving trucks for two department stores. He also consulted the want ads in the newspapers and checked job availability at the State Employment Service. It was only after July 1, 1977 that there was no showing of any efforts to continue searching for parttime employment in addition to his

fulltime job at the refuse department with the City and County of Honolulu. There is no evidence indicating that these representations are false or otherwise unusable. It is found that Louis made reasonable efforts to mitigate his loss of income during the backpay period. Aircraft and Helicopter Leasing and Sales, Inc., supra at 664.

Accordingly, it is concluded that Louis is entitled to total net backpay of $2,952.17, exclusive of interest.

i. Ronald Sai

Sai was parttime employee of Respondent working fulltime for the Fire Department. Net backpay is claimed from February 12, 1977 to October 18, 1980 in the amount of $15,995.25. Following his unlawful

discharge, Sai sought employment at several bus companies including Polynesian Adventure and Polynesian Hospitality. Eventually, in March 1977, he was hired as dispatch manager at Charley's. Sai resigned this position in June 1977 and became an ordinary dispatcher. Shortly thereafter he resigned employment at Charley's without having another job available.

Respondent asserts that Sai's resignation as dispatch manager and eventual departure from Charley's constitutes a willful loss of earnings of a nature which would terminate their backpay obligations. Respondent does not dispute Sai's assertion that while working as dispatch manager for Charley's he had to work more than 40

hours a week, greater than the 20 hours a week he usually had to work for Respondent. There is no basis to discredit Sai's assertion that he had to work much longer hours as dispatch manager than he did as a parttime driver for Rainbow. Also uncontroverted is Sai's assertion that dispatchers earn much less than bus drivers. As noted in the discussion of claimant Kaaiai, quitting an interim position does not necessarily constitute a willful loss of earning.

The issue is whether Sai's actions were justifiable personal or other reasons. Shell Oil Company, supra at 87. Where an employee has a "moonlighting" job, a second job from which he is discriminatorily discharged, it is found that having to

work an additional 40 hours or more a week at the interim job engendered too difficult a pattern of life and was "unsuitable" interim employment. See Lozano Enterprises, supra at 258; John S. Barnes Corp., supra at 585; Winn-Dixie Stores, Inc., 170 NLRB 1734, 1744 (1968) Artim Transportation, 193 NLRB 179, 183 (1971). See also Phelps Dodge Corp. v N.L.R.B., 313 U.S. 177, 197-200. Once Sai became an ordinary dispatcher, the job had such limited remuneration that he was justified in quitting to seek employment other than as dispatch manager. See Shell Oil Co., supra 218 NLRB at 90. See further N.L.R.B. v. Madison Courier Inc., supra at 397-398. Respondent has failed to show that the dispatcher's job at

Charley's was substantially equivalent employment. See N.L.R.B. v. Mastro Plastics, supra at 174, n.3, and McCann Steel Co. v. N.L.R.B., supra at 652.

After leaving Charley's in the second quarter of 1978, Sai secured a job at a trucking firm, Ray's Express. He worked there from June 14, 1978 to January 31, 1980. This job ended because of lack of work. The record is unclear as to whether he was laid off or was never recalled due to lack of work. There was no showing that he quit Ray's Express, only that business exigencies ended the need for his services. Respondent argues that certain comments made by Sai during its taking of his his deposition indicated that he did not want to work

after February 1, 1980. To place the deposition statements in context, they are quoted as follows:

> Q. Do you know where [a picket] worked? Was he a driver for Hawaiian Scenic?
>
> A. No.
>
> Q. Did you get the feeling he was a guy who maybe did some movie jobs, or was a friend of Rutledge's, was an old long-time member of the Union?
>
> A. Yes. I think he was working for Hawaii Five-O.
>
> Q. Now, after you've worked for Charley's and Ray's Express, what brought about the fact that you stopped working, apparently stopped working, parttime?
>
> A. I'm rich. I don't need any more money. I just got a big raise.[20/]
>
> Q. Is that the real reason, or you just got tired of working two jobs?
>
> A. Yes, I got tired of working two jobs.

See Respondent's Exhibit I-17, pages 19-20.

The deposition was taken on August 7, 1979, a time when Sai was working for Ray's Express, and he continued working for that employer parttime until the end of January 1980. This fact gives credence to his testimony that his answer was an attempt at sarcasm. He admittedly was tired of working two jobs, but needed the income as demonstrated by continuing his "moonlighting" work. His intent in making this comment was not explored in the deposition. Considering his previous reference to Hawaii Five-O and Respondent's knowledge that he was working two jobs at the time the questions were asked, it is concluded that Sai's

characterization of the comment as sarcasm is the most credible interpretation.

After Sai stopped working at Ray's in January 1980, he did not work parttime for any other employer until the end of that year. He sought employment with Polynesian Adventure Tours, Polynesian Hospitality, and Citywide Transportation or Trucking, either after he left Ray's or while he was working at Ray's. It is found that seeking parttime employment at only two companies during an 8 to 9 month period does not show reasonable diligence; and therefore he should not be awarded any backpay for the second, third and fourth quarters of 1980.

Respondent next asserts that it should not have to pay for those days

when Sai was on vacation or sick leave or was disabled. In 1977, Sai took sick leave on January 9, February 14, March 31, August 13, October 17 and 19, and December 17. In 1979, he took sick leave from his fireman's job on February 4, March 21, April 8, May 3 and October 30, and was disabled for oral surgery Mary 20-29. In 1979, he took sick leave from his fireman's job on January 8 and 10, May 18, June 19 and July 16 and 29. He also hurt his back and was off from his Fire Department job from March 3 to 29. Since it is found that he was not entitled to backpay after he left Ray's Express, his leave record for the rest of 1980 is not pertinent.

As found above, an occasional day of sick leave from fulltime employment

has not been shown by Respondent to warrant an offset since such occasional illnesses might have been already factored into the calculation of gross backpay. A different situation obtains with regard to the back injury. Unfortunately Respondent did not ask Sai any details as to the nature and extent of the back injury nor was any representative of the Fire Department or the City and County of Honolulu asked any questions as to what the Fire Department's policy is with regard to placing individuals on leave for injuries so that one could equate inability to perform duties as a fireman with an inability to perform duties as tour bus or truck driver. This failure is Respondent's and all

doubts must be resolved in favor of the claimant.

Similarly, the oral surgery that warranted his taking sick leave from the Fire Department job from May 20 to 29, 1978 was not shown to be equally disabling from engaging in activities such as a tour bus or truck driver. No questions were asked about the nature of the surgery or what standards the Fire Department has for safe job performance or any other points of comparison to permit the inference Respondent now seeks to draw without any record evidence.

Respondent failed to indicate whether these injuries were unrelated to either his parttime or fulltime employment. The record is devoid of any evidence regarding how the back

injury occurred or what led to the needed dental work. Disabilities incurred during and in the course of interim employment are not proper offsets. Accordingly, it is found that such periods of disability were not shown to be proper offsets against gross backpay.

The various vacation days from the Fire Department where it was not shown that Sai was unavailable for interim employment will not be offsets. Sai stated that between 1977 and 1980 he engaged in fishing trips every 2 months on a friend's boat. There was no indication that this activity differed from when he was employed at Respondent and therefore not already considered in the computation of backpay. Those trips, however, when

it was clearly shown that Sai was off the Island of Oahu and not available for work, such as a trip that he took to the Island of Molokai from September 2 to 5 and to the contiguous 48 states, thence to Canada, from September 5 to 15, returning to the State of Hawaii from September 18 to 29 to bury his father, are found to have been periods of time when he was not looking for work and was unavailable for interim employment. These vacations are offsets. Sai was not available for employment from September 2 to October 1977 which requires a one-third reduction in his gross backpay for that quarter, in the amount of $569.63.

Respondent, while examining Sai, again raised the issue of lack of

pre-trial discovery. Respondent also renewed its request for subpoena enforcement against the State Employment Service to discern the basis for his departure from Charley's. Respondent was informed that a representative of Charley's was present at the trial as well as the claimant. Charley's may have had first-hand documentation and knowledge of the matter, and failure to question them did not raise an issue sufficient to warrant a modification of the ruling regarding the enforcement of the subpoena against the State. Respondent also noted, in an offer of proof on page 918 of the transcript, that it received copies of Sai's bank statements, copies of his mortgage statements and checking account from

two different institutions, as well as material from a credit union. Again, it is difficult to discern what, if any, information Respondent was unable to get from the banks to warrant its request for reopening the proceeding.

In sum, it is concluded that Sai is entitled to a total net backpay of $11,182.34, plus interest, as set forth in Appendix I.

j. Harry Sanford

Sanford's backpay period runs from February 1, 1977 to October 18, 1980. The commencement and termination dates of the backpay period are not in dispute. Sanford was a fulltime employee with Respondent. He was Rainbow's most senior tour bus operator. Sanford applied for employment with Gray Line and was

hired as a parttime driver. Sanford also applied for work with Respondent but was told he would only be hired on a parttime basis.

Gray Line was also known as Hawaii Transportation. Sanford applied at Gray Line because he was unemployed, 54 years old with a son in college, and was tour bus driver since 1967. Respondent contends that by taking the first employment opportunity offered, a parttime job, and not looking for a fulltime position thereafter, Sanford willfully incurred a loss of income and failed to make a diligent search for alternative employment. Applying the standard announced in Aircraft and Helicopter Leasing Co., supra 227 NLRB at 646, it was shown that Sanford sought work within a reasonable period

of time of his discriminatory discharge and accepted a parttime job when no fulltime position was offered by Respondent or other potential employers. Respondent only offered him parttime work. The claimant was not shown to be trained to perform any other work but that of operating a tour bus, was of an age and had family obligations which necessitated the speedy procurement of work. There was no showing that he refused to take any other positions or that any other jobs were offered to him that would have provided greater earnings. The record in this case establishes that Gray Line made the distinction between fulltime and parttime drivers in certain non-salaried benefits and gave fulltime drivers a 40-hour guarantee

of work, but there was no showing that by assuming this position Sanford knowingly or willfully failed to mitigate loss of income. On the contrary, he knew there was a potential to work his way up in seniority and become a fulltime employee, thus gaining secure employment with sufficient remuneration to meet family and other obligations.

The backpay specification, Appendix J, clearly indicates that after 1977, Sanford's course of action did realize interim earnings almost equal to the income he would have received if he had not been unlawfully discharged by Respondent. There was no indication that embarking on a different course of action would have

provided greater mitigation. The record does not show willful incurrence of loss of earnings, a clearly unjustifiable refusal to take desirable new employment or other actions that could be described as not constituting a reasonable effort to mitigate loss of income.

Respondent next notes that Sanford had experienced layoffs during his employment with Gray Line and that, since he did not seek other employment during such periods of layoff, it was a willful failure to mitigate. Sanford testified that he did not seek other employment because he was still working for Gray Line. There was no showing that during these periods of layoff there were other jobs available or offered that he refused to accept.

There was no evidence adduced regarding the nature of the layoff, what type of information he received, or whether he had any knowledge that the layoff would be other than of short duration. Respondent did call a representative of Gray Line who appeared and testified, but no evidence regarding what type of information, if any, the claimant received about the layoffs was adduced.

One layoff lasted from July to September 22, 1977, and then he was again laid off December 4 and may have been recalled December 12, 1977. There was no evidence that the economic downturn impacting Gray Line was not also decreasing the need of other bus companies for employees or that it would be fruitful or

reasonable for him to seek employment elsewhere. There is no evidence he should have known the layoff would be so long. Given the nature of the tour bus industry in Hawaii as reflected in this record, it appears that there were fairly regular periods of layoff of short duration. The summer and fall of 1977 may have been such a period. There was no indication Sanford could not reasonably anticipate quick reinstatement nor of any other factor that should have caused him to seek other employment. Whether Sanford would have lowered his interim earnings by seeking employment elsewhere and losing the seniority he had established at Gray Line was not a matter placed in evidence. Accordingly, it cannot be found that

his failure to seek other employment, given the nature of the tour bus industry, his age, his lack of job skills other than as a tour bus operator, can be construed as a willful loss of earnings or an unreasonable failure to mitigate such loss. On the contrary, Sanford's ability to earn almost the same income after the first year by working for Gray Line that he would have earned had he not been unlawfully discharged, tends to support his decisions regarding the most reasonable manner of mitigation.

As noted above, claimants' obligation to make a reasonable search for similar employment cannot be applied without consideration of the total circumstances involved in each

proceeding and the particular attributes of each claimant. We consider a claimant's actions in seeking employment years after these decisions are made in an historical context that can only be inferred from the record evidence. In this case, those employees who readily found fulltime employment as tour bus drivers with other companies had Japanese language skills. There was no showing Sanford was similarly skilled. It is undisputed that the tour bus companies hired on the basis of personal recommendation or word of mouth. There was no showing that Sanford had sufficient contacts or recommendations to procure other employment. Also, there was no sufficient description of the

operations of Gray Line compared to the other tour bus companies operating in Hawaii that indicated there was a reasonable potential that further searches for employment would have resulted in greater mitigation.

Once Sanford found a potentially long-term position with opportunity to become a fulltime driver, layoffs prior to attainment of senior fulltime positions does not require he leave that position and obtain a new job, possibly with lower seniority and lower pay. There was no evidence about the working conditions at Gray Line which could be considered relevant in determining the reasonableness of his job search. His job search did result in the expeditious acquisition of

employment. See N.L.R.B. v. Tama Meat Packing, 634 F.2d 1071, 1073 (8th Cir. 1980). The decision in Tama Meat Packing, 244 NLRB 1052, also refused to speculate as to a claimant's particular actions. Respondent has the obligation to reduce, if not eliminate, the need for such speculation and has failed to do so in this case. It is concluded that Sanford made an honest and good faith effort to obtain suitable interim employment given his background and experience.

Respondent further argues that Sanford's leave record at Gray Line indicates that he was unavailable for work on a number of days due to illness or vacations. Respondent failed to show that these were proper

offsets against gross backpay since Sanford, as a fulltime employee of Rainbow, was entitled to vacation leave as well as sick pay. Sanford was compensated for a broken wrist which temporarily disabled him. This was apparently an industrial accident. There was no showing that Respondent would not have similarly compensated him nor that it should be considered a proper offset.

The only offset allowable for Workers Compensation payments is where temporary disability payments are given as a substitute for lost wages under applicable state law. There are differences among the states. Respondent did not contend that under Hawaiian law compensation was given as a substitute for lost wages. The

record is unclear in this proceeding as to whether the benefits or payments received by Sanford are deductible insofar as they constitute payment for wages lost by a discriminatee during a backpay period rather than a reparation for physical damage suffered, thus a collateral benefit unrelated to wages and excluded from computation of interim earnings. Respondent did not ask for any time to investigate the matter even though the testimony about this injury was given prior to the 6-week recess in the proceeding.

Sanford was incapacitated from September 20 to October 2, 1980. There was no showing by Respondent that if he remained in its employ he would not have been compensated as a

fulltime employee for this period of incapacitation. Since this could have been a benefit he would have received from Respondent, it is not properly considered as an offset to gross backpay. See John J. Canova, d/b/a Canova Moving and Storage Co., supra at 640. Since Respondent failed to bear its burden of proving mitigation, all doubts must be resolved in favor of the claimant; these offsets will not be allowed.

It is concluded that Sanford should receive total net backpay of $10,279.23, plus interest.

The Remedy

For the reason described above, I find the Respondent's obligations to the discriminatees herein will be discharged by the payment to them of

the respective amounts set forth in the Appendices annexed hereto. Such amounts shall be payable, plus interest on those sums, in the manner provided in F.W. Woolworth Co., 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651. See generally Isis Plumbing & Heating Co., 138 NLRB 716 (1962).[21]

Respondent, Rainbow Coaches, Inc., of Honolulu, Hawaii, its officers, agents, successors, and assigns, shall make the employees involved in this proceeding whole by payment to them of the following amounts, together with interest as set forth in the section of this Decision entitled "The Remedy," and continue until the amounts are paid in full, but minus

tax withholdings required by federal

and state laws:

Simeon Agao, Jr.	$ 7,321.18
Michael Akamine	$ 1,663.18
Miles Fonseca	$18,421.76
Yukio Iho	$ 1,687.57
Lane Kaaiai	$14,963.76
Eric Kama	$ 9,166.14
Ralph Kaui	$17,251.24
James Louis	$ 2,952.17
Ronald Sai	$11,182.34
Henry Sanford	$10,279.23
Paul Uwata	-0-

Dated: April 12, 1984

Joan Wieder
Administrative Law Judge

FOOTNOTES

[1] Hawaii Revised Statute Section 383-95 provides, in relevant part:

> (a) Except as otherwise provided in this chapter, information obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity. Any claimant (or his legal representative) shall be supplied with information from the records of the department to the extent necessary for the proper presentation of his claim in any proceeding under this chapter. Subject to such restrictions as the director may by regulation prescribe, the information and determinations may be made available to:
>
> (1) any federal or state agency charged with the administration of an unemployment compensation or the maintenance of a system of publish [sic] employment offices,
>
> (2) the bureau of internal revenue of the United States Department of Treasury,

(3) any federal, state or municipal agency charged with the administration of a fair employment practice or anti-discrimination law, and

(4) Any other federal, state or municipal agency if the director deems that the disclosure to the agency serves the public interest.

(b) Information obtained in connection with the administration of the employment service may be made available to persons or agencies for purposes appropriate to the operation of a public employment service.

Section 383-144 of the Hawaii Revised Statutes provides a penalty for unlawful disclosure of the subpoenaed material by imposing a fine of not less than $20 or more than $200 or imprisonment for not more than 90 days, or both.

[2] 261 NLRB 639 (1982).

[3] As here pertinent, Chapter 92E, Hawaii Revised Statutes, was enacted in 1980 to implement the following portion of an amendment to the Hawaii State Constitution:

> The right of the people to privacy is recognized and shall not be infringed without a showing of a compelling state

interest. The legislature shall take affirmative steps to implement this right.

"Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's educational, financial, medical, or employment history, ... "Personal record" includes a "public record," as defined under section 92-50.

HRS Section 92-50 defines "public record" and states:

As used in this part, "public record" means any written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made or is required to be made by law, or which any public officer or employee has received or is required to receive for filing, but shall not include records which invade the right of privacy of an individual.

Section 92E-13 provides that:

Nothing in this chapter, . . . shall be construed to permit or require an agency to withhold or

deny access to a personal record, or any information in a personal record:

(1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record or information is allowed by prevailing rules of discovery or by subpoena in any judicial or administrative proceeding; . . .

It is noted that Respondent's argument as to the relevance of these matters contained on page 87 of its brief does not give page citations to the transcript. The brief does indicate at page 86 that Respondent understood its obligation to establish the potential relevance of the subpoenaed material. It does mention that they wished to review the records for signs of regular patterns of sizeable deposits. However, when questioning the witnesses, Respondent did not ascertain the nature of the accounts or the claimants' sources of income. Since several of the employees were parttime employees of Respondent with fulltime employment elsewhere, Respondent did not establish how such regular deposits would indicate interim employment. Although Respondent's proposed or potential use of the accounts was clear, there were consistent failures

to demonstrate that the subpoenaed documents were of such a nature as to be of potentially probative value. Repeated requests for information to permit an informed ruling were not met by Respondent, even though bank officials were present on two or more occasions, and all discriminatees appeared and testified.

[5] That section provides:

> The business of the company is not seasonal. In seasonal industries, there are relatively wide fluctuations in employee earnings depending upon the season of the year. Thus, if the unfair labor practice occurred in a season of low business activity, the average of employee earnings during such period would be inordinately low and result in failure to make the discriminatee whole.

[6] Some other deficiencies in Respondent's Exhibit V-2 are: the calculations contained therein failed to take into account vacations or illnesses; and, the assumption of status as fulltime or parttime employee was based on designations given on payroll, and do not reflect with requisite accuracy when parttime employees were elevated to fulltime status. For example, Uwata was shown only as a fulltime employee, yet his

testimony clearly demonstrated that he was, for a portion of the time reflected on the exhibit, a parttime employee. The exhibit does not indicate if an employee who left in the middle of the quarter or only worked a couple of days would have his income averaged in with all the others. It does not show how many hours and/or days each listed employee worked during the quarter. Accordingly, Respondent's Exhibit V-2 provides no basis for making a finding of prospective earnings. Respondent's reference to this exhibit is misplaced. See, for example, page 23 of its brief.

[7] See the testimony of Paul Uwata, Tr. p.2419, where he indicated the number of hours he worked each week fluctuated weekly or at times daily. This situation obtained both before and after the strike.

[8] The Board "is only required to employ a formula reasonably designed to produce approximate awards due." Trinity Valley Iron & Steel Co. v. N.L.R.B., supra, 410 F.2d at 1177, n.78; N.L.R.B. v. Charley Toppino and Sons, Inc., 358 F.2d 94, 97 (5th Cir. 1966); N.L.R.B. v. East Texas Steel Casting Co., 255 F.2d 284 (5th Cir. 1958).

[9] The concepts of "willful loss of income" and "reasonable efforts to mitigate" were explained in detail in Aircraft and Helicopter Leasing Co.,

Inc., supra 227 NLRB at 646, affirmed in High View, Inc., 250 NLRB 549, 550-551 (1980), and Neely's Car Clinic, 255 NLRB 1420 (1981), which provides:

> An employer may mitigate his backpay by showing that a discriminatee "willfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment" (Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 199-200 (1941).), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. N.L.R.B. v. Mooney Aircraft, Inc., 366 F.2d 809, 813 (5th Cir. 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or a low interim earning; rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575-576 (5th Cir. 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable assertion in this regard, not to the highest standards of diligence. N.L.R.B. v. Arduini Mfg. Co., 395 F.2d 420, 422-423

(1st Cir. 1968). Success is not the measure of the sufficiency of the discriminatee's search for interim employment; the law "only requires an honest good faith effort." And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor conditions in the area are factors to be considered. Mastro Plastics Corp., 136 NLRB 1342, 1359.

In determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes the employee had diligently sought other employment during the entire backpay period. Saginaw Aggregates, Inc., 198 NLRB 598 (1972); Nickey Chevrolet Sales, Inc., 195 NLRB 395, 398 (1972).

It is well established that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966); Southern Household Products Company, Inc., 203 NLRB 881 (1973).

[10] For example, Charles G. Moffat, of Robert's Hawaii Tours and Transportation, stated specifically that he had personal knowledge that

Sanford did not apply. However, it was further ascertained that Robert's has more than one office, that Sanford could have inquired at another office or from an individual at the office where Moffat worked but not Moffat, been told that there were no openings and Moffat would have no knowledge of such an inquiry. Moffat did not know what the personnel director actually told prospective employees.

[11] Agao testified with candor, a forthright demeanor and inherent consistency.

[12] The record does not clearly indicate how many sick and vacation days fulltime drivers received during the backpay period. These benefits varied during the backpay period and Kolt could not specifically recall that benefits were in effect at the various times here pertinent.

[13] There is some confusion in the record regarding when Fonseca started working at Charley's. The representative of Charley's testified that the records indicate Fonseca was first hired by that company April 12, 1977, after he quit his second employment with Respondent. However, Respondent's Exhibit No. P-9(a) indicates that he was paid for a period in March 1977. Fonseca, in his testimony, candidly indicated that he was working for Charley's prior to his quitting Respondent.

[14] Backpay awards are made by the NLRB pursuant to Section 10(c) of the National Labor Relations Act. As found in McCann Steel v. N.L.R.B., 570 F.2d 652 at 655 (C.A. 6, 1978):

> [Backpay awards] are generally calculated by subtracting from what an employee would have earned but for his wrongful discharge the amount the employee actually earned in the interim between the discharge and the offer of reinstatement. The award is also reduced by any willful loss of earnings by the employee. . . . A willful loss of earnings include the refusal of the employee to "accept substantially equivalent employment." [Citations omitted.]
>
> We believe that "substantially equivalent employment" refers to the hours worked at the interim employer as well as the nature of the work there.

[15] Kaaiai was living on the Island of Oahu rent free to his discharge. Thus, this is not considered an offset against gross income. As noted by General Counsel, house-sitting does not constitute earnings that are deductible from gross backpay. Citing Melrose Processing Company, 151 NLRB 1352 (1965); United Aircraft Corporation, supra at 1073.

[16] Kama also worked for just 3 days for Kekona, a transportation service for golf courses. This employment was outside the backpay period. Respondent did not call any witnesses from Kekona.

[17] Kama was on sick leave May 6-8, 1977; August 17-21, 1978; September 24-26, 1978; and July 7-11, 1979.

[18] At transcript page 2082, Talkin stated that there were similarities in the hours ". . . only with regard to March."

[19] There was no attempt to investigate whether this reference to cliques indicated there was harassment by any supervisory personnel or others who might be construed as agents of Respondent.

[20] There was no showing that he got a big raise or a raise of such a nature and quality as to give credence to this particular statement.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX A

Claimant: Simeon Agao, Jr.

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	DEDUCTIBLE EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
1977	I	$2,491.52	$ 822.38[1/]	$15.00[2/]	$ 807.37	$1,684.15
	II	3,810.56	3,492.58[1/]	-0-	3,492.58	317.98
	III	3,810.56	3,094.02[1/]	-0-	3,094.02	716.54
	IV	3,810.56	2,543.68[1/]	-0-	2,543.68	1,266.88
1978	I	3,810.56	3,949.05[1/]	-0-	3,949.05	-0-
	II	3,897.08	3,112.96[1/]	-0-	3,112.96	784.12
	III	3,933.33	3,276.55[1/]	-0-	3,276.55	656.78
	IV	4,003.50	4,073.07[1/]	-0-	4,073.07	-0-
1979	I	4,061.46	4,024.48[1/]	-0-	4,024.48	36.98
	II	4,097.51	4,554.95[1/]	-0-	4,554.95	-0-
	III	4,155.19	4,975.34[1/]	-0-	4,975.34	-0-
	IV	4,155.19	3,467.56[1/]	-0-	3,467.56	687.63

1980	I	4,456.72	4,656.16[1/]	-0-	4,656.16	-0-
	II	4,625.92	4,178.55[1/]	-0-	4,178.55	447.37
	III	4,625.92	4,175.09[1/]	-0-	4,175.09	450.83
	IV	1,067.52	795.60[1/]	-0-	795.60	271.92
					Total Net Backpay	$7,321.18

1/ Robert's Hawaii Tours, Inc.; Royal VSP Services
2/ Mileage, telephone calls
3/ Robert's Hawaii Tours, Inc.

APPENDIX B

Claimant: Michael Akamine

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$2,326.62	$ 776.48[1/]	$1,550.14
	II	3,558.36	4,763.96[1/]	-0-
	III	3,558.36	3,445.32[1/]	113.04
	IV	3,558.36	4,192.62[1/]	-0-
1978	I	3,558.36	4,799.60[1/]	-0-
	II	3,640.92	4,839.10[1/]	-0-
	III	3,675.48	5,616.18[1/]	-0-
	IV	3,785.76	5,454.17[1/]	-0-
1979	I	3,789.76	4,820.46[1/]	-0-
	II	3,827.16	5,656.70[1/]	-0-
	III	3,887.00	6,111.56[1/]	-0-
	IV	3,887.00	5,397.78[1/]	-0-

1980	I	4,174.52	6,629.90[1/]	-0-
	II	4,335.76	5,833.70[1/]	-0-
	III	4,335.76	6,214.40[1/]	-0-
	IV	1,000.56	1,243.80[1/]	-0-
		Total Net Backpay		$1,663.18

1/ Robert's Hawaii Tours, Inc.

THIRD AMENDED
APPENDIX C

Claimant: Miles Fonseca

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,067.26	$ 652.93[1/]	$ 414.33
	II	1,632.38	483.45[2/]	1,148.93
	III	1,632.38	298.00[3/]	1,334.38
	IV	1,632.38	216.00[3/]	1,416.38
1978	I	1,632.38	577.15[4/]	1,055.23
	II	1,670.92	666.25[3/]	1,004.67
	III	1,682.70	795.20[4/]	887.50
	IV	1,701.96	513.13[4/]	1,188.83
1979	I	1,701.96	360.86[5/]	1,341.10
	II	1,701.96	47.90[5/]	1,654.06
	III	1,701.96	473.19[6/]	1,228.77
	IV	1,701.96	416.66[7/]	1,285.30

1980	I	1,771.28	416.66[1/]	1,354.62
	II	1,840.93	416.66[1/]	1,424.27
	III	1,840.93	416.66[1/]	1,424.27
	IV	283.22	64.10[1/]	219.12
		Subtotal		$18,381.76
		Union dues		40.00
		TOTAL NET BACKPAY		$18,421.76

1/ Rainbow Coaches, Charley's Tours & Transportation
2/ Charley's Tours & Transportation, Inc.
3/ Greyhound
4/ Greyhound, Charley's Tours & Transportation, Inc.
5/ Charley's Tours & Transportation
6/ Charley's Tours & Transportation, Inc., Casual construction work
7/ Casual construction work

App. 350

APPENDIX D

Claimant: Yukio Iho

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$2,465.85	$ 825.48[1/]	$1,640.37
	II	3,771.30	4,440.62[1/]	-0-
	III	3,771.30	3,724.10[1/]	47.20
	IV	3,771.30	4,460.16[1/]	-0-
1978	I	3,771.30	4,693.52[1/]	-0-
	II	3,858.66	4,262.10[1/]	-0-
	III	3,895.30	5,308.68[1/]	-0-
	IV	4,019.92	5,739.16[1/]	-0-
1979	I	4,024.80	4,846.96[1/]	-0-
	II	4,061.20	5,685.50[1/]	-0-
	III	4,119.44	6,403.90[1/]	-0-
	IV	4,119.44	5,480.70[1/]	-0-

1980	I	4,424.10	6,538.14[1/]	-0-
	II	4,595.11	5,898.70[1/]	-0-
	III	4,595.11	6,403.40[1/]	-0-
	IV	1,060.41	1,269.69[1/]	-0-
		Total Net Backpay		$1,687.57

1/ Robert's Hawaii Tours, Inc.

AMENDED

APPENDIX E

Claimant: Lane Kaaiai

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$ 993.48	$ -0-	$ 993.48
	II	1,519.44	-0-	1,519.44
	III	1,519.44	-0-	1,519.44
	IV	1,519.44	-0-	1,519.44
1978	I	1,519.44	-0-	1,519.44
	II	1,557.72	-0-	1,557.72
	III	1,569.39	-0-	1,569.39
	IV	1,588.47	-0-	1,588.47
1979	I	1,588.47	-0-	1,588.47
	II	1,588.47	-0-	1,588.47
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-

1980	I	-0-	-0-	-0-
	II	-0-	-0-	-0-
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-
		Total Net Backpay		$14,963.76

SECOND AMENDED
APPENDIX F

Claimant: Eric Kama

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,233.01	$ -0-	$1,233.01
	II	1,885.78	474.40[1/]	1,411.38
	III	1,885.78	-0-	-0-
	IV	1,885.78	-0-	-0-
1978	I	1,885.78	286.08[1/]	1,599.70
	II	1,933.42	-0-	-0-
	III	1,947.95	-0-	-0-
	IV	1,971.71	564.21[1/]	1,407.50
1979	I	1,971.71	1,034.51[1/]	883.98
	II	1,971.71	1,305.48[1/]	666.23
	III	1,971.71	1,879.80[1/]	91.91
	IV	1,971.71	299.28[1/]	1,672.43

1980	I	2,057.28	1,061.47[2/]	995.81
	II	2,143.18	1,094.26[2/]	1,048.92
	III	2,143.18	1,273.23[2/]	869.95
	IV	412.15	119.53[1/]	292.62
		Subtotal		$ 8,966.14
		Union dues		200.00
		TOTAL NET BACKPAY		$ 9,166.14

1/ Charley's Tours & Transportation, Inc.
2/ Charley's Tours & Transportation, Inc.; Robert's Hawaii Tours, Inc.

AMENDED
APPENDIX G

Claimant: Ralph Kaui

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	DEDUCTIBLE EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
1977	I	$2,554.34	$1,633.46[1/]	$34.50[2/]	$1,598.96	$ 955.38
	II	3,906.63	3,144.48[1/]	37.50[4/]	3,106.98	799.65
	III	3,906.63	1,431.13[1/]	37.50[4/]	1,393.63	2,513.00
	IV	3,906.63	3,293.51[5/]	37.50[4/]	3,256.01	650.62
1978	I	3,906.63	5,144.70[6/]	39.00[4/]	5,105.70	-0-
	II	3,997.11	2,342.42[6/]	39.00[4/]	2,303.42	-0-
	III	4,035.09	787.96[7/]	39.00[4/]	748.96	1,941.23
	IV	4,164.12	4,729.77[7/]	39.00[4/]	4,690.77	-0-
1979	I	4,169.23	5,335.21[6/]	39.00[4/]	5,296.21	-0-
	II	4,206.93	3,846.90[6/]	39.00[4/]	3,807.90	399.03
	III	4,267.25	4,277.98[6/]	39.00[4/]	4,238.98	28.27
	IV	4,267.25	4,891.87[8/]	39.00[4/]	4,852.87	-0-

1980	I	4,582.91	2,826.47[1/]	48.00[4/]	2,778.47	1,804.44
	II	4,760.08	1,589.31[1/]	48.00[4/]	1,541.31	3,218.77
	III	4,760.08	542.32[1/]	48.00[4/]	494.32	4,265.76
	IV	915.40	255.31[1/]	8.00[4/]	243.31	672.09
				Total Net Backpay		$17,251.24

1/ VSP Tours, Interisland Resorts
2/ Union dues, mileage
3/ Interisland Resorts
4/ Union dues
5/ Interisland Resorts, ARA Services
6/ ARA Services
7/ ARA Services, Columbia Pictures
8/ ARA Services, Hawaiian Scenic Tours
9/ Hawaiian Scenic Tours

AMENDED
APPENDIX H

Claimant: James Louis

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,653.76	$1,137.37[1/]	$ 516.39
	II	2,529.28	93.50[1/]	2,435.78
		Total Net Backpay		$2,952.17

1/ Rainbow Coaches

SECOND AMENDED
APPENDIX I

Claimant: Ronald Sai

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,116.22	$ 311.76[1]	$ 804.46
	II	1,707.16	2,250.00[1]	-0-
	III	1,707.16	140.25[1]	997.34
			569.53[4]	
	IV	1,707.16	354.87[1]	1,352.29
1978	I	1,707.16	371.95[1]	1,335.21
	II	1,750.24	269.30[2]	1,480.94
	III	1,763.35	425.25[1]	1,338.10
	IV	1,784.77	1,400.00[3]	384.77
1979	I	1,784.77	777.00[1]	1,007.77
	II	1,784.77	1,565.38[1]	219.39
	III	1,784.77	1,585.50[1]	199.27
	IV	1,784.77	1,288.00[1]	496.77

1980	I	1,862.28	306.25[1/]	1,556.03
	II	-0-	-0-	-0-
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-

Total Net Backpay $11,182.34

1/ Charley's Tours & Transportation, Inc.
2/ Charley's Tours & Transportation, Inc.; Ray's Express
3/ Ray's Express
4/ Offset for unavailability

App. 361

AMENDED
APPENDIX J

CLAIMANT: HENRY SANFORD

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
1977	I	$2,622.34	$1,230.03[1/]	$1,392.31
1977	II	4,010.63	2,703.09[1/]	1,307.54
1977	III	4,010.63	317.92[1/]	3,692.71
1977	IV	4,010.63	2,669.61[1/]	1,341.02
1978	I	4,010.63	3,964.81[1/]	45.82
1978	II	4,101.11	3,192.37[1/]	908.74
1978	III	4,139.09	4,570.98[1/]	-0-
1978	IV	4,268.12	3,450.50[1/]	817.62
1979	I	4,273.23	3,875.78[1/]	397.45
1979	II	4,310.93	4,413.87[1/]	-0-
1979	III	4,371.25	6,296.27[1/]	-0-
1979	IV	4,371.25	5,236.39[1/]	-0-

1980	I	4,686.91	5,140.43[1/]	-0-
1980	II	4,864.08	5,535.84[1/]	-0-
1980	III	4,864.08	4,918.52[1/]	-0-
1980	IV	929.40	553.38[1/]	376.02
		Total Net Backpay		$10,279.23

1/ Grayline

-x-

241 NLRB No. 86

Rainbow Tours, Inc., d/b/a Rainbow Coaches and Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Ronald Sai and Garrett Wong. Cases 37-CA-1341, 37-CA-1342, and 37-CA 1387

March 29, 1979

DECISION AND ORDER

By CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

On March 29, 1978, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has

delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein[4]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the
United States Government

WE WILL NOT interfere with the right of our employees to seek and secure representation by Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America, or any other labor organization, by threatening them with loss of business, new buses, and the services of the manager (Steve Kolt) who brought in that new business, as well as loss of employment, if the employees seek or secure representation by the labor organization named above, or any other labor organization.

WE WILL NOT interfere with the right of our employees to engage in protected concerted activities by discharging them for refusing to cross a picket line established at our premises.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National

Labor Relations Act, as amended, to organize, form, join, or assist labor organizations, bargain collectively through representatives of their choosing, engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or refrain from any or all such activities.

WE WILL offer Henry Sanford, Ralph Kaui, Ross Iho, Michael Akamine, Jay Agao, James Louis, Paul Iwata, G. Lane Kaaiai, Ronald Sai, Garrett Wong, Miles Fonseca, and Eric Kama reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, with full restoration of their seniority and other rights and privileges, and make them whole for any loss of

earnings they may have suffered as a result of their unlawful discharge by us for refusing to cross a picket line established by the labor organization named above.

FOOTNOTES

[1] Respondent has excepted to certain credibility findings made by the Administrative law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc. 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We disavow any suggestion by the Administrative Law Judge that Respondent, if properly motivated, could have discharged the strikers herein so as to be able to obtain replacements. When employees engage in a total refusal to perform work, as here,as opposed to a partial work stoppage, there is no business need to discharge the strikers to obtain replacements. In such circumstances a discharge of the strikers is unlawful. Newberry Energy Corporation, Industrial Division, 227 NLRB 436, 437 (1976).

The Administrative Law Judge inadvertently finds that under Respondent's reinstatement offer the first full-time striking driver to be reinstated would be no. 8 on the seniority roster; the correct number is 10.

[2] The Administrative Law Judge found that the Teamsters picketing was not recognitional at its inception. We find it unnecessary to pass on this finding since we find that, even if it was recognitional at its inception, it was not unlawful.

[3] The Administrative Law Judge in the remedy section of his decision orders backpay for the discharged strikers "for all wages and other benefits lost between the date of their discharge and their reinstatement..." Chairman Fanning and Member Truesdale agree with this finding. See Abilities and Goodwill, Inc., 241 NLRB 27 (1979).

Member Murphy, in accordance with her dissent in that case, would find that Respondent's backpay obligation herein did not commence until the employees applied for reinstatement.

[4] In his recommended Order, the Administrative Law Judge Provided that Respondent shall cease and desist from "in any like or related manner interfering with, restraining or coercing its employees in the exercise of" their Sec. 7 rights. However, we have found that Respondent discharged 12 employees in violation of the Act. The discharge of an employee for engaging in protected activities is an unfair labor practice which goes to the very heart of the Act, and in such cases the Board traditionally provides

broad injunctive language constituting a broad order. Accordingly, we shall modify the Administrative Law Judge's recommended Order to require that Respondent cease and desist from "in any other manner" infringing upon the rights guaranteed to its employees by Sec. 7 of the Act. Ambulance Services of New Bedford, Inc., 229 NLRB 106 (1977); N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532 (4th Cir. 1941).

RAINBOW TOURS, INC., D/B/A RAINBOW COACHES

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative law Judge: On July 6 through 13, 1977, I conducted a hearing in Honolulu, Hawaii, to hear issues raised by a complaint issued on April 29, 1977, and amended during the hearing, consolidating issues raised by a charge filed by Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[1] on March 2, 1977, in Case 37-CA-1341; a charge and amended charge filed by Ronald Sai on March 4 and May 16, 1977, in Case 37-CA-1342; and a charge filed by

Garrett Wong on July 5, 1977, in Case 37-CA-1387.[2] The latter case was consolidated with the former two cases during the hearing inasmuch as all three cases involve common parties, circumstances, and issues and to avoid unnecessary costs and delay. The April 29, 1977, complaint was amended during the hearing to add Case 37-CA-1387 to the proceeding to name Garrett Wong as a party; to add a new paragraph I(c) stating that Ronald Sai filed his first amended charge in Case 37-CA-1342 on May 16, 1977, and a copy thereof was served on Rainbow Tours, Inc., d/b/a Rainbow Coaches[3] the same day; to add a new paragraph I(d) stating Garrett Wong filed his charge in Case 37-CA-1387 on July 5, 1977, and a copy thereof was served on the

Company the same day; and to add the names Garrett Wong, Miles Fonseca, and Eric Kama to paragraph VI(c) of the complaint.

The amended, consolidated complaint alleged that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (hereafter called the Act) by threatening employees with loss of new buses and sale of the Company if they sought representation for the purpose of bargaining collectively with the Company over their rates of pay, wages, hours, and working conditions and discharging employees for respecting a picket line established by the Union at the Company's premises.

The Company denied it made the alleged threats; asserted employees

who respected the Union's picket line were not engaged in activity protected under the Act because the Union's picketing was unlawful; asserted employees who respected the Union's picket line did so becuase of fear of violence and therefore were not engaged in activity protected under the Act; and finally asserted employees who respected the Union's picket line were replaced for valid and legitimate business reasons and therefore their discharges were not violative of the Act. The Company also contended two of the employees (Ronald Sai and Ralph Kaui) were not entitled to reinstatement because Sai was discharged for cause and Kaui was a supervisor, and none of the alleged discriminatees are entitled to

reinstatment because they did not make unconditional offers to return to work.

The issues before me are:

1. Whether the Company threatened employees with loss of new buses and sale of the Company to inhibit their seeking and securing representation for collective-bargaining purposes.

2. Whether the Company discharged employees for respecting the Union's picket lines.

3. If either or both the above issues are answered in the affirmative, whether the Company thereby violated the Act.

4. Whether Sai and Kaui and the other alleged discriminatees are entitled to the benefit of a reinstatment order.

The parties appeared by counsel at the hearing and were afforded full opportunity to produce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel and the Company.

Based upon my review of the entire record,[4] observation of the witnesses, perusal of the briefs and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer (as amended at the hearing) admitted, and I find at all pertinent times that the Company was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of

Section 2(2),(5),(6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The parties stipulated and I find the Company is the successor of a bus company known as Transportation Associates (hereafter called TA). TA was controlled by its chairman and president, Harold Fukunaga, and shared a yard and headquarters with another bus company known as Charley's located on Piikoi Street in Honolulu. Prior to October 1976, TA's operations were directed by Brian McCreadie, its general manager, inasmuch as Fukunaga spent most of his time at his regular employment as an executive of Love's Bakery in Honolulu. In October 1976, Steven Kolt purchased a 30 percent

interest in TA and assumed the presidency of TA from Fukunaga. While McCreadie remained in TA's employ as general manager, Kolt assumed control of its operations.[5] Prior to assuming TA's presidency, Kolt spent approximately 20 years in the tour-ground transporation business, working both on the mainland (primarily in the Los Angeles area) and on Oahu. Between 1970-75 he was vice president and a director of Hawaiian Scenic Tours in charge of its ground transporation, which consisted of two divisions--one providing bus transporation for school children and the other bus transportation to tourists. Hawaiian Scenic's Oahu-based bus drivers were represented by the IBT and its outer

island bus drivers were represented by the International Longshoremen and the Harborworkers Union (hereafter called ILWU). Kolt dealt with both unions on a day-to-day basis and became familiar with their representativea, contracts, and operations.

During the time Kolt was negotiating the purchase of a 30 percent interest in TA (between January and October 1976), the Teamsters sought recognition, picketed the yard shared by TA and Charley's, and succeded in securing recoginition and a contract with Charley's.

When Kolt assumed control of TA's operations, the Company was operating 12 old buses leased from another tour-bus operator called Robert's Ullima tours. It was operating at a

loss. It was also signatory to an agreement with Robert's to lease 20 new buses scheduled for delivery in two lots; a lot of 10 scheduled for December 1976 and a second lot of 10 scheduled for January or February 1977. One of the first things Kolt did (in October 1976) was meet with TA's drivers, advise them he was in charge, that the Company was having financial difficulties, that he intended to secure new accounts and make the Company profitable, and that the Company would bring their wages, etc., up to parity with those paid by the Company's competitors when it became profitable. In response to a question concerning his attitude toward union representation of the drivers, he responded he felt

employees did not need union representation if their employer handled problems as they arose and maintained open communication; that tour operators would be more interested in using TA for their transporation needs if it was nonunion; and suggested the drivers give him a trial period of about 8 months to see what he could and would do for them.

Between October and December 1976, Kolt renegotiated the lease agreement with Robert's, changing it from a straight lease to four lease-purchase agreements[6] and limiting the agreements to 10 rather than 20 buses. Within a short time he also secured several new accounts.

By December 1976 the name of the Company had been changed from TA to Rainbow; the Company had moved to Kelokoi Street in Honolulu to occupy space leased from and shared with Robert's, using Robert's wash crews and mechanics to service its buses;[7] six new buses had been added to Rainbow's fleet; new full-time[8] drivers were added to the work force;[9] and three new accounts had been secured by Kolt.

On December 15, 1976, Kolt again met with the Company's drivers. He announced the Company was going to invite the families of its employees, customers and friends to a Christmas luau; that he had secured three new accounts for the Company and expected to gain several more in the near

future; that six of the new buses had been delivered and four more were coming, all on lease from Robert's;[10] that he needed the support of the drivers to keep the new accounts, secure more, and make the Company profitable; and repeated his promise to bring the drivers' wages to parity with those of the Company's competitors when the Company achieved a profitable status. He also stated that the rumors that he was going to terminate McCreadie's employment were false,[11] he and McCreadie had worked well together in the past and he expected they would continue to do so; that the rumor he was going to give preferential treatment to the new drivers from Hawaiian Scenic was also false, while they were his friends he

believed in following seniority principles and the older drivers would not lose out to the new ones. Kolt was again questioned concerning his attitude towards union representations of the drivers. He replied he had amicable relations with both the ILWU and the IBT while he was employed by Hawaiian Scenic, that he believed the ILWU did a better job of representing its members, and was critical of IBT representation, tactics, and policies. He went on to state he favored many of the policies and procedures contained in labor agreements, such as the seniority principle and a three-step disciplinary procedure, but if the Company's drivers went union, the Company would lose the big, new

accounts he brought in; consequently, it would lose the new buses, and he would have to pull out.[12]

As noted heretofore, by December 28, 1976, 10 new buses were in service and a number of former Hawaiian Scenic drivers had been hired as full-time employees. Prior to the delivery of the first lot of new buses (four in number) the Company employed five full-time drivers and a varying number of casual and part-time drivers. The five full-time drivers and their dates of hire (by either Rainbow or its predecessor, TA) were:

Henry Sanford	September 21, 1971
Ralph Kaui	February 12, 1975
Ross Iho	September 26, 1975
Mike Akamine	September 27, 1975
Jay Agao	March 22, 1976

On January 10, 1977, the Company posted a notice it was going to

increase its roster of full-time drivers and would give first priority to present drivers, provided they were not employed fulltime elsewhere (or were prepared to give up such full-time employment). Sometime thereafter,[13] the Company posted the following document:

FULL-TIME DRIVERS AS OF JAN. 15, 1977

Our list of Full Time Drivers has expanded to include the following [by seniority number and seniority date of hire]:

Date of Hire	Name
9-21-71	Henry Sanford
2-12-75	Ralph Kaui
9-26-75	Ross Iho
9-27-75	Mike Akamine
3-22-76	Jay Agao
1-14-77	Vernon Nelson
1-15-77	James Kaopuiki
1-16-77	Bobby Fujimoto
1-17-77	Peter Sataraka
1-19-77	Bozo Kaiihue
1-20-77	Billy Martinez
1-21-77	Ike Sataraka[14]

On or about January 25, 1977, Ronald Sai, employed by the Company as a part-time driver from October 1976, approached Kolt to inquire why he and other part-time drivers, employed full time as city firemen,[15] had not received pay increases granted to other employees. Kolt replied he had not increased their wages because he doubted their loyalty to the Company and thought the firemen were organizing for the Union.[16] When Sai protested, Kolt promised to consider them for a wage increase in about 30 days.

A few days later (on Friday, January 28, 1977) approximately 19 of the Company' drivers, including full-time drivers Sanford, Kaui, Iho, Akamine, and Agao and part-time

drivers Fonseca, Paul Iwata, G. Lane Kaaiai, Kama, James Louis, Sai, and G. Wong, met at McCreadie's home. The men discussed their dissatisfaction over the hire of Kolt's friends from Hawaiian Scenic as full-time, rather than part-time, probationary drivers and their assignment to the best vehicles and tours, and elected Kaui and G. Wong as their spokesmen to express their grievance to Kolt. They also decided to seek representation by the ILWU in the event they were not satisfied with Kolt's response. McCreadie was present throughout the meeting.

The following morning (Saturday, January 29, 1977) IBT pickets appeared outside the Rainbow yard with picket signs reading "Rainbow Coaches is

paying substandard wages" and "Rainbow Coaches is working without a union contract". Sai was scheduled to work that day at his full-time employment as a fireman, commencing his shift at 8 a.m. He was at the firehouse early (at about 7 a.m.) and received a call there advising him there were IBT pickets outside the Rainbow yard. He went to the yard, observed the picketing, and telephoned Kaui and G. Wong. They decided to invite the 19 drivers who attended the meeting at McCreadie's house the preceding evening to meet the following morning opposite the yard to decide what they ought to do. They divided up the list of 19 names for notification. Both Sai and G. Wong also telephoned the

Company's dispatcher and requested to be placed on sick leave.

Iho and Agao commenced work on January 29, 1977, before the pickets arrived. Both were advised by radio telephone of the picketing, that they would be given assignments throughout the day by radio, and instructed to remain away from the yard until the dispatcher advised them the pickets had left. They followed instructions and worked all day, returning their buses to the yard after the dispatcher advised them the pickets had dispersed and directed their return to the yard. During the course of their work that day, both Iho and Agao observed a carload of men unknown to them pull up in front of their buses and an occupant in the rear seat, after

getting their attention, sketching the outline of a box or a coffin with his hands. Sanford was scheduled to work on January 29, but, seeing the pickets on arriving at the yard at about 8:30 a.m., decided not to cross the picket line and returned home.

Kolt telephoned Kama that evening and informed Kama of the IBT picket line, but told Kama not to worry about it and to report for work the next morning. Sanford was telephoned by the dispatcher and instructed to report for work the following morning. Iwata was also instructed to report for work on January 30.

Sanford and Iwata reported for work on Sunday, January 30, prior to the arrival of any pickets. Sanford asked why he was called in, since

Sunday was his regular day off. Kolt informed him he was called because he had not worked the day before when he was scheduled. Sanford and Iwata picked up their worksheets and microphones, checked out their buses, and proceeded towards the gate, with Sanford in the lead. Before Sanford reacned the gate, pickets appeared outside. Sanford stopped the bus and informed Kolt he was not going to go through the picket line. Kolt approaced Iwata and asked him what he was going to do. Iwata replied he was not going to go through if Sanford was not going through. Kolt stated that if Iwata was not going to drive he would have to discharge him,--the Company had to keep the buses rolling. Sanford and Iwata backed the

buses up, returned them to their parking spaces, and came to the company offices to turn in their microphones and worksheets. Kolt asked Sanford, if the pickets were there for 30 days did that mean Sanford would not drive for 30 days. Sanford replied affirmatively. Kolt then stated if Sanford left, he was not to return. Sanford asked if that meant he was fired. Kolt replied affirmatively. On the same day, James Louis left the yard with a bus prior to the arrival of any pickets. While he was parked at a tourist stop awaiting the return of his passengers, a stranger approached the door of the bus and instructed him to take the bus back to the yard. Louis refused. Soon thereafter a car arrived and one

of the occupants again approached his door and instructed him to take the bus back to the yard and look outside his window. Louis looked out the window and saw men pointing a shotgun and pistols at him. He stated he would return the bus to the yard. He then radioed the dispatcher, told him what had occurred, and stated he was bringing the bus in (over the dispatcher's objections). Louis returned the bus to the yard and reported the incident to Kolt. Kolt said the men were just trying to frighten Louis. Louis replied he was not afraid personally, but he had been through a labor dispute before and his family had been threatened; he was a member of the union which represented the employees at his full-time

employment (by the city refuse department); and he was not going to work while the Company was picketed. When Kama arrived at the yard that morning and saw the pickets, he telephoned the dispathcer and stated he was not going through the picket line.

At or about 7 a.m. the same day (Sunday, January 30) Sai, G. Wong, Kaui, and other Rainbow drivers (the three were able to reach) began to gather across the street from the Rainbow lot. Sai and Kaui recognized several of the pickets as Hawaiian Scenic drivers. They asked why the IBT was picketing and pickets stated the IBT was upset over Hawaiian Scenic's loss of both accounts[17] and drivers to Rainbow. Their remarks

were reported to the group. When Sanford and Iwata joined the group, they reported their discharge. The group discussed the discharges, the Iho and Agao incidents of the previous day, and the IBT picketing. They decided to stay together as a group, to seek ILWU representation, and to return to work. Sanford was designated to contact the ILWU. Sanford invited the group to come to his home and continue the discussion. McCreadie came to Sanford's home, joined the group, and participated in the discussion. Sanford attempted to contact an ILWU representative known to him, but was unsuccessful that day (Sunday). Iho contacted the company dispatcher and was given a starting time the following day. He was later

contacted by Kaui, however, and requested to meet with the group outside the picket line the following morning prior to reporting for work. Others of the group were also contacted and requested to meet the following morning.

Kolt, Fukunaga, and McCreadie held a meeting at the Rainbow yard that evening attended primarily by drivers who worked while Rainbow was picketed,[18] plus some recent hires and prospective employees.[19] Kolt told the gathered drivers he believed the IBT picketing was aimed mostly at Robert's,[20] with the IBT taking on both Robert's and Rainbow mainly because they shared the yard. He stated Rainbow's customers were supporting Rainbow and it would be

able to stay in business so long as it was able to provide service and so long as the drivers continued to work as Robert's drivers had. One of the drivers asked what protection Rainbow could give them. Kolt replied that the Company could not afford to give 24-hour protection, but would provide protection while the bus was in operation. A driver who had not driven for Rainbow prior to the picketing asked what status he and others who came to work for the Company after the picketing started would have after the picketing ceased. Kolt stated he felt obligated to take care of drivers who showed their loyalty to the Company by working during the picketing by giving them a higher seniority status than

those who failed to support the Company or refused to work while Rainbow was picketed.

Many of the original group of 19 met again across from the picket line on Monday morning, January 31, Sanford reported he had contacted the ILWU and its representative informed him the ILWU and IBT had agreed that neither would seek to organize the employees of an employer where the other had previously initiated an organizational effort and, since the IBT had made a previous attempt to organize TA's drivers, the ILWU would not represent them. The group decided to seek IBT representation and to respect the IBT picket line. Iho asked whether the Company should be informed. He was authorized to contact the Company's

dispatcher and advise that they were respecting the picket line and would not be in to work and so advised the dispatcher. The group moved its meeting over to the Pawaa fire station and were joined by McCreadie. McCreadie was advised of their decisions; he informed them that several new drivers had been hired[21] and the Company intended to hire still others[22] so the longer they stayed out the less the likelihood they would be reinstated.[23] During the day the group contacted the IBT, signed authorization cards, and were advised by the IBT, it would be unlawful for the Company to discharge them for respecting the IBT picket line.[24]

That evening most of the group[25] attended a meeting at the Pawaa firehouse. They designated G. Wong as their spokesman, detailed questions they wished discussed with the Company (the seniority status of the former Hawaiian Scenic drivers and their preferential treatment, their seniority status, etc.), and invited Kolt to attend the meeting. When Kolt arrived, Wong attempted to discuss the questions the group had raised. Kolt replied that he was not there to discuss company policies, but to tell them he needed their services and wanted them to return to work. A driver asked him what their current status was, i.e., had they been discharged. After some equivocation,[26] in response to

repeated inquiries if being replaced meant they had been fired, he told them if they wanted him to use the word fired, that was their status if they did not come back to work after the meeting.[27] In response to inquiries concerning their status if they returned to work, Kolt criticized the group as lacking guts, depicted their refusal to cross the IBT picket line as disloyalty, and stated he was taking care of his "loyal" employees, so the ones he accepted would go to the bottom of the seniority roster, i.e., the first full-time returnee would be no. 8 on the full-time seniority roster and the first part-time returnee would also be no. 8 on the part-time roster.[28] Kolt also advised the group he needed their

services, he felt the Company could survive the picketing, he felt they and the Company were being used as tools by the IBT, repeated the need for the Company to maintain its services in order to retain its customers and its need for their help, and stated that if they wanted union representation any union other than the IBT was acceptable to him.

The group decided against accepting Kolt's offer of reemployment under the conditions stated.

The following day (Tuesday, February 1) Henry Hanalei Kaaihue and Walter Nelson commenced work as full-time drivers for the Company.

That same day Kolt met with Rutledge. Rutledge asserted he represented a majority of the

Company's drivers and requested recognition and a contract. He also requested information concerning the Company's current wage scales, fringe benefits, etc. Kolt handed him a document listing the requested information, but said the Company could not afford to go union at its present growth stages, it could not survive. Kolt was not convinced a majority of the drivers wanted IBT representation and declined to recognize the IBT or state they had an agreement,[29] suggesting they let the matter be determined by an NLRB-conducted election. Rutledge then asked Kolt to take the old drivers back, with full seniority. Kolt replied he would take them bakc, but would only give them seniority

behind those who stayed with him.

At Rutledge's suggestion that evening that they apply unconditionally for reinstatement to the Company and his assurance that such applications would be accepted by the Company, most of the discriminatees[30] went to the Rainbow yard the next morning (Wednesday, February 2) to apply for reinstatement. They entered the yard as a group and were addressed by Kolt outside his office. Kolt stated there were no full-time openings, but he would accept their applications for part-time employment as and when needed. The group consulted with the IBT and were advised to file the requested applications. They returned and did so. On completing their

applications, Kolt interviewed them one at a time, reviewed their applications and supporting documents (driver's license, health card, etc.), and in most instances told the applicant he would call him if and when his services were needed, but never called the applicant thereafter.[31] In Kaui's case, Kolt noted Kaui's health card had expired. Kaui explained he had telephoned the doctor for a physical examination in order to renew his card and could not get an appointment until February 4.[32] Kolt asked him to wait outside. While Sanford initially withdrew upon Kolt's advice that only part-time employment was available, he later returned and stated he would accept any employ. Kolt asked him if

he was ready to go to work that day. Sanford replied in the negative, stating he had plans for the rest of the day, but was available the following day. Kolt suggested he check later to see if work was available the next day. When Louis entered Kolt's office for his employment interview, he did not have his health card with him and was instructed to bring it in. He did so and was advised there was work for him the following day. He worked on February 3 and has worked in a part-time capacity for the Company since that date. Kolt interviewed Kama, found his documents satisfactory, and asked him if he was available for work. Kama replied affirmatively and was instructed to

check later and he would be advised if there was work for him. Kolt checked Sai's documetns and found them satisfactory. He expressed his distress at seeing Sai outside the picket line on Sunday, January 30, after receiving a report Sai had called in sick, and asked if he worked at the firehouse that day. Sai replied he was not scheduled to work at the firehouse that day and was not feeling well, but came down to the picket line to try to find out what was going on. Kolt testified he told Sai he had more respect for those who stated they were not going to work because of the picket line and he did not want to employ a liar; that if he wanted to hire Sai he would call him, but did not think he would call. Sai

denied Kolt made such statements, but simply told Sai he would call him if his services were needed. I find Kolt raised a question concerning Sai's presence at the picket line (both testified to that) but did not call Sai a liar or tell him he would not be called, simply stating he told Sai not to call the Company, it would call him if it wanted to hire him, and no more. Kolt found Fonseca's documents satisfactory and asked him if he was available that day. Fonseca replied negatively. Kolt then told him to check later and he would be advised if work was available for him. Iwata was interviewed, his documents found satisfactory, and returned to work on February 3. Kaaiai was interviewed, his documents approved, and instructed

to check and he would be advised if work for him was available. G. Wong did not appear to fill out an application and submit to an individual interview with Kolt that morning. Other members of the original group of 19 (not named in the complaint as alleged discriminatees) filled out applications and were assigned part-time work along with Louis and Iwata (Herman Kalahiki, William Kamaka, and A. Wong).[33]

Following their individual interviews, the alleged discriminatees (with the exception of G. Wong) gathered in the yard outside Kolt's office. Kolt came outside and announced he had work that day for only one of the group and since Kamaka was the first member of the group with

proper qualifications to come through the door, he was putting Kamaka to work. The group then dispersed. As they left the yard, Sai met G. Wong coming to put in his application and informed G. Wong of Kolt's position and his announcement there were no present work opportunities. On the basis of that advice, G. Wong did not file an application for reinstatement that day. Later in the month he went to the yard to file an application and was advised by McCreadie that McCreadie culd not furnish him an application, he would have to see Kolt (Kolt was not there). G. Wong made no further attempt to secure reinstatement.

Towards evening the same day, most of the group returned to the yard to

secure their paychecks for the previous work period (the Company paid its employees every other Wednesday for the 2 weeks prior to each payday). Kolt informed the group there was no work for them the following day (February 3).[34]

Sanford, Kaui, Iho, Akamine, and Agao, all alleged discriminatees, full-time drivers, and numbers 1 through 5 on the full-time seniority roster prior to the commencement of the IBT picketing, have never been recalled by the Company either in a full-time or part-time capacity; neither have alleged discriminatees and part-time drivers Sai, Kaaiai, Kama, and G. Wong. Alleged discriminatees and part-time drivers Louis, Iwata, and Fonseca have been

recalled, with seniority dates from the date of the first such recall. Additional members of the original group of 19 and part-time drivers Kamaka, Kalahiki, and A. Wong have also been recalled.; their seniority dates are not of record.

The picketing continued until February 18, 1977. During the picketing, and particularly in the early period, there is no question the Company lost business[35] and income.[36]

B. Analysis and Conclusions

1. The alleged threats

Kolt made it clear in his remarks to the drivers in his December 15, 1976, meeting with them the Company was unprofitable when he purchased an interest in it; that he had taken

accounts away from the Company's unionized competitors because they preferred to employ the Company for their transportation needs because it was nonunion; that he was aware the company wage scales, etc., were lower than those of the company's unionized competitors; and that his staying with the Company, retaining the new accounts he had secured, his acquisition of additional new accounts, the consequent profitability of the Company, its ability to pay for and retain the newly purchased buses, and its ability to bring their wage scales, etc., up to parity with the Company's competitors were all contingent upon their not seeking and securing union representation. Kolt obviously was alert to the drivers'

interest in such representation (by the questions the drivers raised concerning that possibility at both the October and December meetings) and aware (by his promises of wage parity) of the appeal union representation had by virtue of the higher wage scales, etc., in the contracts between his competitors (including his former employer, Hawaiian Scenic) and the IBT and ILWU.

The implication Kolt left with the Company loses my services, the accounts I have brought in, any possibility of additional new accounts, profits, the new buses, any possibility of wages increases and, obviously, a question of whether the Company and their jobs would continue.

Such an implied threat clearly interfered with, restrained, and coerced the drivers in the exercise of their right to seek representation from a labor organization for the purpose of bargaining collectively with the Company concerning their wages, rates of pay, hours, and working conditions, and I so find and conclude.

I therefore find and conclude the Company violated Section 8(a)(1) of the Act by virtue of Kolt's December 15, 1976, remarks noted above.

2. The alleged discriminatory discharges

It is undisputed that Kolt discharged Sanford and Iwata on Sunday, January 30, 1977, when they refused to take their buses through the IBT picket line. It is similarly

undisputed that on the evening of Monday, January 31, 1977, Kolt told 10 of the 12 alleged discriminatees, including Sanford and Iwata and excluding Fonseca and Kama,[37] they were discharged if they failed to contact him individually by midnight, agree to cross the IBT picket lines, and accept whatever terms of recall he offered them.[38] I therefore find and conclude that on or before January 31, 1977, the Company by Kolt discharged the 12 alleged discriminatees for refusing to cross the IBT picket lines and work on whatever terms Kolt offered them.

The Company contends, however, the discharges were not unlawful because (1) the IBT picket line was unlawful; or (2) the dischargees respected the

picket line because of fear of bodily harm; or (3) it was entitled to discharge them and hire permanent replacements for them in order to operate its business.

The Company contends that the picket was illegal because the IBT picketing was an unlawful restraint of trade in violation of the antitrust laws, citing United Mineworkers of America v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945); and Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, 421

U.S. 616 (1975). In each of these cases, however, the union had entered into an agreement with one employer or employer group to use its economic power to force terms on another employer or employer group. There is no valid, probative evidence here that the IBT entered into an agreement with Hawaiian Scenic to restrain Rainbow's business.[39] The Company also argues that the IBT picketing was unlawful in that it was secondary in nature and violative of Section 8(b)(4) of the Act and/or unlawful in that it was recognitional at a time the IBT did not represent any Rainbow drivers and violative of Section 8(b)(7) of the Act.

Findings have been entered that initially the pickets carried signs

clearly identifying Rainbow as the picketed employer and carrying the legend that Rainbow was paying substandard wages and its drivers were not working under a union contract. Findings have also been enetered that Rutledge informed Rainbow's drivers that the initial purpose if the picketing was informational [to inform the public and person doing business with Rainbow of its substandard wages (admittedly below those of Rainbow's unionized competitors) and that it was a nonunion operation.] Findings have also been entered that the pickets, a few days after the Rainbow picketing commenced, began to carry signs identifying Robert's as a picketed employer (presumably with similar messages).

The Company cannot reasonably contend the Rainbow picketing was intended to bring pressure on another employer to yield to IBT demands, since it is clear Rainbow was the target of the picketing because it was causing IBT members to lose job opportunities to the nonunion sector of the industry. So the Company contends the IBT picketing of Rainbow was secondary because the pickets marched across a gate shared by Rainbow and Robert's and a gate posted as one solely for Robert's use, thereby violating Moore Dry Dock[40] standards. In the circumstances of this case, it was the picketing of Rainbow's operations, whatever gate the Rainbow buses went through, which motivated the alleged discriminatees'

refusal to work. Even were the picketing of the gate allegedly disignated as solely for Robert's use by pickets carrying Rainbow signs held to be unlawful, it is clear this would not support a finding that the picketing of the gate used by Rainbow and Robert's (the picketing which the alleged discriminatees respected) was unlawful. It is further noted that Kolt testified he farmed out asubstantial portion of Rainbow's work to Robert's for performance by Robert's buses and drivers during the picketing; Robert's certainly ceased to be an unoffending neutral to the IBT-Rainbow dispute at that point and became Rainbow's ally, which would justify picketing both gates.

With reference to the claim of alleged 8(b)(7) violation, the evidence indicates initially that the picket line was not recognitional, a necessary ingredient to a finding of violation of Section 8(b)(7), but rather informational [and the second proviso to Section 8(b)(7)(C) specifically excludes informational picketing from the coverage of the section]. While picketing may have been converted into a recognitional picket line after the alleged discriminatees (and possibly other Rainbow employees) signed IBT authorization cards and the IBT requested recognition as their representative (on the third and fourth day of picketing), the evidence is insufficient to support a finding

that the picketing thereafter became unlawful in the absence of evidence concerning the nature of the petition that the alleged discriminatees (and possibly others) signed at the IBT hall for presentation to the NLRB Regional Office (it may have complied with the statutory requirement of a petition filing) or that the cessation of picketing by February 18 was sufficiently timely that a finding of Section 8(b)(7) is not supportable.

For the reasons set out above, I find and conclude the Company has not demonstrated by substantial, probative evidence that the IBT picketing of Rainbow was unlawful and thereby deprived the alleged discriminatees of the protection of the Act.

Citing N.L.R.B. v. Union Carbide Corp., 440 F.2d 54 (4th Cir. 1971), cert. denied 404 U.S. 826 (1971), and other cases, the Company next contends the alleged discriminatees refused to cross the picket line because they feared bodily harm, not because they made common cause with the picketing union, and therefore their respecting the picket line was not activity protected under the Act.

In a 1972 decision,[41] the Board rejected the Union Carbide holding, adopting the statement of the Trial Examiner in that case that:

> . . . contrary to the court's holding in Union Carbide, the Board's decisions regard an employee's motive for honoring a picket line as irrelevant. Thus, in Cooper Thermometer Co., 154 NLRB 502, the Board said, at 504:
>
> > [T]he focal point of inquiry in determining whether [an

> employee's] refusal to cross the picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than the employee's motives for engaging in the activity.

Accordingly, since I am required "to apply established Board precedent which the Board or the Supreme Court has not reversed," I regard as without merit the Respondent's contention that a refusal to cross a picket line isan unprotected activity when it is motivated by fear.

Even if one were to apply the Union Carbide ruling in this case, the Company's argument lacks merit. While it may be true Sanford and others among the 12 alleged discriminatees failed or refused to cross the IBT picket line on January 29 and 30 because they feared violence to their persons,[42] they met together on January 31 prior to the time Kolt discharged them, decided to stay

together as a group, decided to secure IBT representation, and thereby joined cause with the IBT as employees of Rainbow on strike against it because, as proclaimed on the IBT picket signs, Rainbow was paying substandard wages and they were not working under a union (IBT) contract.

Thus, both on the basis of Board doctrine and under the facts and circumstances of this case, I reject the Company's contention that the 12 alleged descriminatees were engaged in conduct unprotected under the Act because some of their number may have refused to cross the IBT picket line on January 29 and 30 primarily due to their fear of bodily harm.

The Company contends that in any event it was entitled to discharge its

striking employees and hire permanent replacements for them in order to maintain its business operations, citing N.L.R.B. v. Southern Greyhound Lines, Division of Greyhound Lines, Inc.. 426 F.2d 1299 (5th Cir. 1970); Redwing Carriers, Inc. and Rockana Carriers, Inc., 137 NLRB 1545 (1962), enfd. 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964); and Swain & Morris Construction Co., 168 NLRB 1064 (1967), enfd. 431 F.2d 861 (9th Cir. 1970).

While it is well settled that an employer has a right to terminate strikers and hire replacements for them in order to continue business operations,[43] the Board, with court approval, has developed the doctrine that the employer's only motive for

effecting such terminations must be to secure performance of the strikers' work (and not in retaliation for their withholding their services), and such termination is necessary to secure perfomances of that work.[44]

In this case, just the opposite occurred. The evening after the 12 alleged discriminates informed McCreadie they were joining the IBT and supporting its picketing efforts against the Company, Kolt told them he would deal with any union other than the IBT; told them their respecting and joining the IBT cause demonstrated their lack of loyalty as contrasted to the conduct of the other drivers who remained on the job; and advised them while he needed them, if they returned and if he offered them jobs, they

would be at the bottom of the respective full-time and parttime seniority lists, behind the drivers who remained on the job. The Board has ruled on several occasions that an offer of reinstatement to strikers accompanied by an announcement that those who accept such offer will be accorded the status of new hires, with consequent loss of their previous seniority standing, is clearly retaliation for engaging in activities protected under the Act unrelated to any need to continue operations,[45] and a violation of Section 8(a)(1) of the Act. Kolt's December 15, 1976, remarks to the drivers, his January 25 comments to Sai, and his remarks at the January 31 meeting all demonstrate Kolt's hostility to the IBT and anyone

supporting it, particularly as the representative of any of Rainbow's employees.

Since Kolt also advised the drivers at the January 31 meeting that if they accepted his offer of reinstatement as new employees, the first full-time driver rehired would be number 8 on the full-time seniority roster and the first part-time driver rehired would also be number 8 on the part-time seniority roster, it is clear vacancies existed[46] at that time. I therefore find and conclude, by Kolt's January 31, 1977, discharge of the 12 discriminatees for refusing to go through their designated representatives' picket line and accept the status of new employees at a time there were job vacancies, shows

Kolt discharged the 12 alleged discriminatees in retaliation for their supporting the IBT picket line and not solely due to business considerations. I therefore further find that by such discharges Kolt violated Section 8(a)(1) of the Act.

The company next contended that the alleged discriminatees did not make an unconditional offer to return to work and therefore are not entitled to reinstatement; that Sai in any event is not entitled to reinstatement because he was discharged for cause; and that Kaui is not entitled to reinstatement because he was a supervisor.

Since findings have been entered that the 12 alleged discriminatees were discharged for engaging in

protected concerted activities, the normal remedy is an order directing the employer to make a current offer to reinstate them to their former positions or, if those positions no longer exist, to subtantially equivalent postitions, and to reimburse them for any wage losses they have suffered between the date of such reinstatement. There appears little reason to depart from that remedy here, inasmuch as it is readily apparent the alleged discriminatees and their representative made it clear the alleged discriminatees desired reinstatement, with all rights restored.

In any event, I find Sanford, Kaui, Iho, Akamine, Agao, Fonseca, Iwata, Kaaiai, Kama, Louis, and Sai

unconditionally offered to return to work on February 2, 1977, and G. Wong would have done so but for receiving a report that Kolt had refused to reinstate any of the 11 just named to their former positions and status.

I further find, in accordance with factual findings entered heretofore, that Kolt did not discharge Sai on February 2, 1977, for cause, i.e., for calling in sick the previous Sunday when he was not in fact ill, but rather only questioned Sai about appearing outside the picket line after calling in sick and, after hearing Sai's explanation, accepting Sai's application and telling Sai he would be contacted if needed.

As far as Kaui is concerned, it is undisputed that Kaui spent 85 to 90

percent of his time driving a bus and 10 to 15 percent of his time training and familiarizing other drivers on equipment; that Mike Akamine and Vernon Nelson also did such training; that Kaui was not authorized to hire or fire employees, did not hire or fire employees, and did not direct employees in the performance of their work. I therefore find and conclude Kaui was not a supervisor within the meaning of the Act. It is true that Kaui did not have a valid health card at the time he was interviewed by Kolt on February 2, 1977. It is undisputed that Kaui's health card expired on January 23, 1977; that McCreadie was aware of such expiration, aware that on January 21, 1977, Kaui scheduled a medical appointment for the purpose of

securing its renewal for February 4, 1977, and authorized Kaui to continue to drive, which he did, between January 23 and 28, 1977; and that Kaui secured a renewal of his health card on February 4, 1977. On the basis of the foregoing, I find Kaui is entitled to reinstatement under the Act.

CONCLUSIONS OF LAW

1. At all pertinent times Rainbow was an employer engaged in commerce in a business affecting commerce and the IBT and ILWU were labor organization within the meaning of Section 2(2), (5), (6), and (7) of the Act.

2. At times pertinent Kolt and McCreadie were supervisors and agents of Rainbow acting on its behalf within the meaning of Act.

3. At times pertinent Kaui was not a supervisor of the Company acting on its behalf.

4. Rainbow violated Section 8(a)(1) of the Act on December 15, 1976, by Kolt's statement that Rainbow would lose several major accounts that he brought in, its new buses, and his continued efforts and participation in and on behalf of Rainbow if they sought and secured union representation.

5. Rainbow violated Section 8(a)(1) of the Act on January 31, 1977, by discharging employees Sanford, Kaui, Iho, Akamine, Agao, Fonseca, Iwata, Kaaiai, Kama, Louis, Sai, and G. Wong in retaliation for their support of the IBT.

The above unfair labor practices affected commerce as defined in the Act.

THE REMEDY

Having found the Company interfered with the rights of Sanford, Kaui, Iho, Akamine, Agao, Fonseca, Iwata , Kaaiai, Kama, Louis, Sai, and G. Wong to engage in protected concerted activities by discharging them for refusing to cross the picket line at its premises, I shall recommend the Company be directed to cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act: Offer the 12 persons just named reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

jobs, with full restoration of their seniority and other rights and privileges as they existed prior to their discharge, and reimburse the 12 persons for all wages and interest thereon computed in the manner prescribed in F.W. Woolworth Company, 90 NLRB 289 (1950) and Florida Steel Corporation, 231 NLRB 651 (1977),[47] and post appropriate notice thereof. Having further found that the Company interfered with the rights of its employees to seek and secure union representation by threatening the employees with loss of business, loss of new buses, and loss of services of the manager who brought in major new business (and therefore an implied threat of loss of their jobs) if they sought and secured union

representation, I shall recommend the Company be directed to cease and desist therefrom and post appropriate notice thereof.

On basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant of Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[48]

The Respondent Rainbow Tours, Inc., d/b/a Rainbow Coaches, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with the right of its employees to seek and secure union representation in violation of Section 8(a)(1) of the Act by threatening them with loss of business, new buses, the

services of the manager who brought in that new business, and loss of employment if they sought and secured union representation.

(b) Interfering with the right of its employees to engage in protected, concerted activity in violation of Section 8(a)(1) of the Act by discharging them for refusing to cross a picket line established at its premises.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Henry Sanford, Ralph Kaui, Ross Iho, Michael Akamine, Jay Agao, James Louis, Paul Iwata, G. Lane Kaaiai, Ronald Sai, Garrett Wong, Miles Fonseca, and Eric Kama immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges.

(b) Make Henry Sanford, Ralph Kaui, Ross Iho, Michael Akamine, Jay Agao, James Louis, Paul Iwata, G. Lane Kaaiai, Ronald Sai, Garrett Wong, Miles Fonseca, and Eric Kama whole for any loss of earnings they may have suffered as a result of their discharges, as provided in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Honolulu, Hawaii, copies of the attached notice marked "Appendix."[49] Copies of said notice, on forms provided by the Regional Director of Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

FOOTNOTES

[1] Hereinafter called Teamsters or IBT or the Union.

[2] This case was consolidated with Cases 37-CA-1341 and 37-CA-1342 after the hearing commenced (see Statement of the Case infra, for details).

[3] Hereafter called Rainbow or the Company.

[4] Pursuant to the General Counsel's motion, certain errors in the transcript have been noted and are hereby corrected.

[5] I find at all times pertinent Fukunaga, Kolt, and McCreadie were supervisors and agents on behalf of both TA and its successor, Rainbow.

[6] The four lease-purchase agreements were executed on December 1, 1976, and provided for the delivery of four buses on December 1, 1976, two buses on December 13, 1976, two buses on December 20, 1976, and the final two buses on December 28, 1976.

[7] The terms for such services were not developed in the record.

[8] The Company employed both full-time and part-time drivers.

[9] New drivers were brought over from Hawaiian Scenic by Kolt; they and Kolt had developed friendly relations

while Kolt was employed by Hawaiian Scenic.

[10] He explained the terms of the leases.

[11] McCreadie was popular with the drivers.

[12] The findings contained in this paragraph are based upon the testimony of Kolt and several of the drivers who attended the meeting. Kolt corroborated the drivers' testimony except for their testimony concerning the remarks set out in the last sentence. I credit the drivers' testimony on the basis of the logical relation of the remarks to the general tenor of Kolt's earlier comments, his October comments, and the mutual corroboration and clarity of the drivers' recollection.

[13] Kolt testified the roster was posted sometime between Janaury 15, 1977, and the first day the IBT picketed Rainbow's yard. It was established the picketing began on Saturday, January 29, 1977.

[14] It is undisputed Ike Sataraka commenced work January 21, 1977, worked for a few days, and did not work thereafter.

[15] Sai, Garrett Wong, A. Wong, Eric Kama, Miles Fonseca, and Mike Cabanilla.

[16] The city firemen were represented by a labor organization; Sai had been employed by Charley's when it was organized by the IBT.

[17] Sun Tours and Hawaiian Holidays.

[18] Fujimoto, Martinez, Kaiihue, and Kaopuiki

[19] Walter Nelson, Pablo Ripani, Henry Hanalei Kaaihue, Richard Yamanaka, and Rickard Kekona.

[20] By this time the pickets were also carrying signs saying Robert's was unfair.

[21] Richard Yamanaka, Peter Sataraka, and Pablo Ripani commenced work as full-time drivers on January 31. While the seniority roster posted in late January lists Sataraka with a seniority date of January 17, the work records do not disclose he worked on that date or any date prior to January 31.

[22] Henry Hanalei Kaaihue and Walter Nelson indicated their interest in going to work for the Company at the Janaury 30 meeting at the Rainbow yard, provided they were assured full-time employment and retention when the picketing ceased, which Kolt promised.

[23] McCreadie confirmed, however, that Sanford and Iwata had been discharged and would not be reinstated.

[24] The group was so advised by Arthur Rutledge, the IBT president, and another IBT representative. Rutledge also told them the original purpose of the picket line was "informational".

[25] Ten of the twelve alleged discriminatees were there (Sanford, Kaui, Iho, Akamine, Agao, Iwata, Louis, Kaaiai, Sai, and G. Wong); Fonseca and Kama did not attend, but were notified by the attendees what transpired at the meeting. Others of the original group of 19 also attended (Herman Kalahiki and A. Wong).

[26] Kolt first took the position they were replaced.

[27] He stated he would return to the Rainbow yard after the meeting and remain there until midnight, and if they wanted jobs, to apply as individuals before midnight.

[28] The full-time drivers listed on the full-time seniority roster below alleged discriminatees Sanford, Kaui, Iho, Akamine, and Agao were seven in number. The record does not disclose the identity of the seven part-time drivers who worked during the picketing.

[29] Rutledge asked Kolt to authorize him to tell the drivers who had signed IBT cards that they had an agreement

at a meeting he had scheduled with the card signers that evening.

[30] All but G. Wong.

[31] Agao, Akamine, and Iho's testimony to this effect was uncontradicted and is credited.

[32] Kaui kept the appointment and secured a valid health card on February 4.

[33] All five had previously been part-time employees.

[34] Louis and Iwata, however, were given work assignments for February 3 by telephone. Kamaka was given a work assignment on February 2. The record does not disclose when or how Kalahiki and A. Wong received their work assignments.

[35] Sunset Hawaii-Hawaiian Beachcomber Tours, associated companies, notified Kolt on February 1, 1977, that they were discontinuing use of Rainbow until the labor dispute was concluded.

[36] On January 29 the Company farmed out 145-1/2 hours of work received from its customers to its competitors for performance; the Company normally charged it customers between $24 and $32 per hour for its services. On January 30, the Company farmed out 119-1/2 hour; on January 31, 138-1/2 hours.

[37] Who I find were notified of Kolt's statements later.

[38] Kolt testified he did not foresee a need for any more than 11 full-time drivers for some time (the size of his full-time driver complement prior to January 29). The record does not disclose the size of his part-time driver complement prior to January 29 or the number the Company intended to retain on and after January 31. In view of his statement at the meeting that he intended to put all full-time and part-time drivers who demonstrated their loyalty to the Company by working during the picketing, ahead of any of the alleged discriminatees who applied; his disparaging remarks concerning their courage and loyalty to him; and the nature and number of job offers he made when they appeared on February 2, the nature and extent of Kolt's offer of reinstatement at the January 31 meeting is ambiguous at best.

[39] Kolt's testimony that a former Hawaiian Scenic employee he hired told Kolt by telephone that he appeared at the IBT picket line the previous day because he had been told to do so when he reported for work is hearsay and falls far short of establishing a conspiratorial agreement between Hawaiian Scenic and the IBT to restrain Rainbow's business; is ambiguous; and the fact Hawaiian Scenic drivers were among the pickets

is likewise insufficient proof of such company.

[40] Sailors' Union of the Pacific, AFL (Moore Dry Dock Company, 92 NLRB 547 (1950).

[41] Congoleum Industries, Inc., 197 NLRB 534,547 (1972).

[42] Not all of the 12 alleged discriminatees respected the picket line on January 29 and 30 because of fear of bodily harm; many did so as a matter of principle.

[43] N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

[44] Redwing Carriers, supra; Swain & Morris, supra; Overnight Transportation Co., 209 NLRB 691 (1974).

[45] Decatursville Sportswear Co., Inc., 205 NLRB 824 (1973); Globe Molded Plastics Co., Inc., 204 NLRB 1041 (1973).

[46] The full-time roster posted in late January 1977 listed Sanford, Kaui, Iho, Akamine, and Agao as nos. 1 through 5 and V. Nelson, Kaopuiki, Fujimoto, P. Sataraka, Kaaihue, Martinez, and I. Sataraka as nos. 6 through 12 on the full-time seniority roster; moving the latter seven up would change their numerical order to 1 through 7. Since I. Sataraka left the Company's employ prior to January

29 (when the picketing commenced) and was not replaced, it appears Kolt was offering Sanford, Kaui, Iho, Akamine, and Agao reinstatement in seniority slots 7 through 11 if they accepted his offer of employment as new hires, the reverse of their seniority positions prior to joining the IBT. The record does not disclose the positions of the part-time alleged discriminates on the part-time seniority roster, but it may be presumed reasonably that one of them were numbered between 1 and 7 prior to joining the IBT.

[47] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

[48] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[49] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of

Appeals Enforcing an Order of the
National Labor Relations Board."

In the following cases, the U.S. Court of Appeals for the Ninth Circuit has enforced orders of the NLRB:

* * *

NATIONAL LABOR RELATIONS BOARD v. RAINBOW TOURS, INC. doing business as RAINBOW COACHES, Nos. 79-9260 and 79-7281, August 29, 1980, enforcing 101 LRRM 1042, 241 NLRB No. 86.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINBOW TOURS, INC. d/b/a RAINBOW COACHES, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD Respondent.	)	No. 86-7630 FILED FEB. 18, 1988 Cathy A. Catterson, Clerk U.S. Court of Appeals

JUDGMENT

Before: BROWNING, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Rainbow Tours, Inc., d/b/a Rainbow Coaches, to review a supplemental order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on 30 May 1986, and upon a cross-application filed by the National Labor Relations

Board to enforce said Order. The Court heard argument of respective counsel on 5 November 1987, and has considered the briefs and transcript of record filed in this cause. On 4 December 1987, the Court being fully advised in the premises, issued a memorandum granting enforcement of the Board's Supplemental Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Rainbow Tours, Inc., d/b/a Rainbow Coaches, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall make the employees involved in this proceeding whole by payment to them of the following amounts, together with interest as set forth in the section

of the Administrative Law Judge's Decision entitled "The Remedy," attached hereto as Appendix A and continuing until the amounts are paid in full, but minus tax withholdings required by federal and state laws:

Simeon Agao, Jr.	$7,321.18
Michael Akamine	$1,663.18
Miles Fonseca	$18,421.76
Yukio Iho	$1,687.57
Lane Kaaiai	$14,963.76
Eric Kama	$12,373.44
Ralph Kaui	$15,906.08
James Louis	$2,952.17
Ronald Sai	$11,182.34
Henry Sanford	$10,279.23

Endorsed, Judgment Filed and Entered
DATE ISSUED: 18 February 1988

SO ORDERED

/s/ Cathy A. Catterson
Cathy A. Catterson
Clerk

By:_____
Donald Lewis
Deputy Clerk

APPENDIX A

The Remedy

For the reasons described, I find that Petitioner's obligations to the discriminatees herein will be discharged by the payment to them of the respective amounts set forth in the Appendices annexed hereto. Such amounts shall be payable, plus interest on those sums, in the manner provided in F.W. Woolworth Co., 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651. See generally Isis Plumbing & Heating Co., 138 NLRB 716 (1962).[21]

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21 If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX B

Claimant: Simeon Agao, Jr.

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	DEDUCTIBLE EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
1977	I	$2,491.52	$ 822.38[1/]	$15.00[2/]	$ 807.37	$1,684.15
	II	3,810.56	3,492.58[3/]	-0-	3,492.58	317.98
	III	3,810.56	3,094.02[3/]	-0-	3,094.02	716.54
	IV	3,810.56	2,543.68[3/]	-0-	2,543.68	2,266.88
1978	I	3,810.56	3,949.05[3/]	-0-	3,949.05	-0-
	II	3,897.08	3,112.96[3/]	-0-	3,112.96	784.12
	III	3,933.33	3,276.55[3/]	-0-	3,276.55	656.78
	IV	4,003.50	4,073.07[3/]	-0-	4,073.07	-0-
1979	I	4,061.46	4,024.48[3/]	-0-	4,024.48	36.98
	II	4,097.51	4,554.95[3/]	-0-	4,554.95	-0-
	III	4,155.19	4,975.34[3/]	-0-	4,975.34	-0-
	IV	4,155.19	3,467.56[3/]	-0-	3,467.56	687.63

1980	I	4,456.72	4,656.16 3/	-0-	4,656.16	-0-
	II	4,625.92	4,178.55 3/	-0-	4,178.55	447.37
	III	4,625.92	4,175.09 3/	-0-	4,175.09	450.83
	IV	1,067.52	795.60 3/	-0-	795.60	271.92
					Total Net Backpay	$7,321.18

1/ Robert's Hawaii Tours, Inc.; Royal VSP Services
2/ Mileage, telephone calls
3/ Robert's Hawaii Tours, Inc.

APPENDIX C

Claimant: Michael Akamine

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$2,326.62	$ 776.48[1/]	$1,550.14
	II	3,558.36	4,763.96[1/]	-0-
	III	3,558.36	3,445.32[1/]	113.04
	IV	3,558.36	4,192.62[1/]	-0-
1978	I	3,558.36	4,799.60[1/]	-0-
	II	3,640.92	4,839.10[1/]	-0-
	III	3,675.48	5,616.18[1/]	-0-
	IV	3,785.76	5,454.17[1/]	-0-
1979	I	3,789.76	4,820.46[1/]	-0-
	II	3,827.16	5,656.70[1/]	-0-
	III	3,887.00	6,111.56[1/]	-0-
	IV	3,887.00	5,397.78[1/]	-0-

1980	I	4,174.52	6,629.90[1/]	-0-
	II	4,335.76	5,833.70[1/]	-0-
	III	4,335.76	6,214.40[1/]	-0-
	IV	1,000.56	1,243.80[1/]	-0-
		Total Net Backpay		$1,663.18

1/ Robert's Hawaii Tours, Inc.

THIRD AMENDED
APPENDIX D

Claimant: Miles Fonseca

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
1977	I	$1,067.26	$ 652.93[1/]	$ 414.33
	II	1,632.38	483.45[2/]	1,148.93
	III	1,632.38	298.00[3/]	1,334.38
	IV	1,632.38	216.00[3/]	1,416.38
1978	I	1,632.38	577.15[4/]	1,055.23
	II	1,670.92	666.25[3/]	1,004.67
	III	1,682.70	795.20[4/]	887.50
	IV	1,701.96	513.13[4/]	1,188.83
1979	I	1,701.96	360.86[5/]	1,341.10
	II	1,701.96	47.90[5/]	1,654.06
	III	1,701.96	473.19[6/]	1,228.77
	IV	1,701.96	416.66[7/]	1,285.30

1980	I	1,771.28	416.66[7/]	1,354.62
	II	1,840.93	416.66[7/]	1,424.27
	III	1,840.93	416.66[7/]	1,424.27
	IV	283.22	64.10[7/]	219.12
		Subtotal		$18,381.76
		Union dues		40.00
		TOTAL NET BACKPAY		$18,421.76

App. 465

1/ Rainbow Coaches, Charley's Tours & Transportation
2/ Charley's Tours & Transportation, Inc.
3/ Greyhound
4/ Greyhound, Charley's Tours & Transportation, Inc.
5/ Charley's Tours & Transportation
6/ Charley's Tours & Transportation, Inc., Casual construction work
7/ Casual construction work

APPENDIX E

Claimant: Yukio Iho

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$2,465.85	$ 825.48[1/]	$1,640.37
	II	3,771.30	4,440.62[1/]	-0-
	III	3,771.30	3,724.10[1/]	47.20
	IV	3,771.30	4,460.16[1/]	-0-
1978	I	3,771.30	4,693.52[1/]	-0-
	II	3,858.66	4,262.10[1/]	-0-
	III	3,895.30	5,308.68[1/]	-0-
	IV	4,019.92	5,739.16[1/]	-0-
1979	I	4,024.80	4,846.96[1/]	-0-
	II	4,061.20	5,685.50[1/]	-0-
	III	4,119.44	6,403.90[1/]	-0-
	IV	4,119.44	5,480.70[1/]	-0-

1980	I	4,424.10	6,538.14[1/]	-0-
	II	4,595.11	5,898.70[1/]	-0-
	III	4,595.11	6,403.40[1/]	-0-
	IV	1,060.41	1,269.69[1/]	-0-
		Total Net Backpay		$1,687.57

1/ Robert's Hawaii Tours, Inc.

AMENDED

APPENDIX F

Claimant: Lane Kaaiai

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$ 993.48	$ -0-	$ 993.48
	II	1,519.44	-0-	1,519.44
	III	1,519.44	-0-	1,519.44
	IV	1,519.44	-0-	1,519.44
1978	I	1,519.44	-0-	1,519.44
	II	1,557.72	-0-	1,557.72
	III	1,569.39	-0-	1,569.39
	IV	1,588.47	-0-	1,588.47
1979	I	1,588.47	-0-	1,588.47
	II	1,588.47	-0-	1,588.47
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-

1980	I	-0-	-0-	-0-
	II	-0-	-0-	-0-
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-
		Total Net Backpay		$14,963.76

SECOND AMENDED
APPENDIX G

Claimant: Eric Kama

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,233.01	$ -0-	$1,233.01
	II	1,885.78	474.40[1/]	1,411.38
	III	1,885.78	-0-	-0-
	IV	1,885.78	-0-	-0-
1978	I	1,885.78	286.08[1/]	1,599.70
	II	1,933.42	-0-	-0-
	III	1,947.95	-0-	-0-
	IV	1,971.71	564.21[1/]	1,407.50
1979	I	1,971.71	1,034.51[1/]	883.98
	II	1,971.71	1,305.48[1/]	666.23
	III	1,971.71	1,879.80[1/]	91.91
	IV	1,971.71	299.28[1/]	1,672.43

1980	I	2,057.28	1,061.47[2/]	995.81
	II	2,143.18	1,094.26[2/]	1,048.92
	III	2,143.18	1,273.23[2/]	869.95
	IV	412.15	119.53[1/]	292.62
		Subtotal		$12,173.44
		Union dues		200.00
		TOTAL NET BACKPAY		$12,373.44

1/ Charley's Tours & Transportation, Inc.
2/ Charley's Tours & Transportation, Inc.; Robert's Hawaii Tours, Inc.

App. 471

AMENDED
APPENDIX H

Claimant: Ralph Kaui

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	DEDUCTIBLE EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
1977	I	$2,554.34	$1,633.46[1]/	$34.50[2]/	$1,598.96	$ 955.38
	II	3,906.63	3,144.48[3]/	37.50[4]/	3,106.98	799.65
	III	3,906.63	1,431.13[3]/	37.50[4]/	1,393.63	2,513.00
	IV	3,906.63	3,293.51[5]/	37.50[4]/	3,256.01	650.62
1978	I	3,906.63	5,144.70[6]/	39.00[4]/	5,105.70	-0-
	II	3,997.11	2,342.42[6]/	39.00[4]/	2,303.42	-0-
	III	4,035.09	787.96[7]/	39.00[4]/	748.96	$596.07
	IV	4,164.12	4,729.77[7]/	39.00[4]/	4,690.77	-0-
1979	I	4,169.23	5,335.21[6]/	39.00[4]/	5,296.21	-0-
	II	4,206.93	3,846.90[6]/	39.00[4]/	3,807.90	399.03
	III	4,267.25	4,277.98[6]/	39.00[4]/	4,238.98	28.27
	IV	4,267.25	4,891.87[8]/	39.00[4]/	4,852.87	-0-

1980	I	4,582.91	2,826.47[9/]	48.00[4/]	2,778.47	1,804.44
	II	4,760.08	1,589.31[9/]	48.00[4/]	1,541.31	3,218.77
	III	4,760.08	542.32[9/]	48.00[4/]	494.32	4,265.76
	IV	915.40	255.31[9/]	8.00[4/]	243.31	672.09
					Total Net Backpay	$15,906.08

1/ VSP Tours, Interisland Resorts
2/ Union dues, mileage
3/ Interisland Resorts
4/ Union dues
5/ Interisland Resorts, ARA Services
6/ ARA Services
7/ ARA Services, Columbia Pictures
8/ ARA Services, Hawaiian Scenic Tours
9/ Hawaiian Scenic Tours

App. 473

AMENDED
APPENDIX I

Claimant: James Louis

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,653.76	$1,137.37[1/]	$ 516.39
	II	2,529.28	93.50[1/]	2,435.78
		Total Net Backpay		$2,952.17

1/ Rainbow Coaches

SECOND AMENDED
APPENDIX J

Claimant: Ronald Sai

Year	Quarter	Gross Backpay	Interim Earnings	Net Backpay
1977	I	$1,116.22	$ 311.76[1/]	$ 804.46
	II	1,707.16	2,250.00[1/]	-0-
	III	1,707.16	140.25[1/]	997.34
			569.53[4/]	
	IV	1,707.16	354.87[1/]	1,352.29
1978	I	1,707.16	371.95[1/]	1,335.21
	II	1,750.24	269.30[2/]	1,480.94
	III	1,763.35	425.25[3/]	1,338.10
	IV	1,784.77	1,400.00[3/]	384.77
1979	I	1,784.77	777.00[3/]	1,007.77
	II	1,784.77	1,565.38[3/]	219.39
	III	1,784.77	1,585.50[3/]	199.27
	IV	1,784.77	1,288.00[3/]	496.77

1980	I	1,862.28	306.25[3/]	1,556.03
	II	-0-	-0-	-0-
	III	-0-	-0-	-0-
	IV	-0-	-0-	-0-
		Total Net Backpay		$11,182.34

1/ Charley's Tours & Transportation, Inc.
2/ Charley's Tours & Transportation, Inc.; Ray's Express
3/ Ray's Express
4/ Offset for unavailability

AMENDED
APPENDIX K

CLAIMANT: HENRY SANFORD

YEAR	QUARTER	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
1977	I	$2,622.34	$1,230.03[1/]	$1,392.31
1977	II	4,010.63	2,703.09[1/]	1,307.54
1977	III	4,010.63	317.92[1/]	3,692.71
1977	IV	4,010.63	2,669.61[1/]	1,341.02
1978	I	4,010.63	3,964.81[1/]	45.82
1978	II	4,101.11	3,192.37[1/]	908.74
1978	III	4,139.09	4,570.98[1/]	-0-
1978	IV	4,268.12	3,450.50[1/]	817.62
1979	I	4,273.23	3,875.78[1/]	397.45
1979	II	4,310.93	4,413.87[1/]	-0-
1979	III	4,371.25	6,296.27[1/]	-0-
1979	IV	4,371.25	5,236.39[1/]	-0-

1980	I	4,686.91	5,140.43[1/]	-0-
1980	II	4,864.08	5,535.84[1/]	-0-
1980	III	4,864.08	4,918.52[1/]	-0-
1980	IV	929.40	553.38[1/]	376.02
		Total Net Backpay		$10,279.23

1/ Grayline

-x-

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAINBOW TOURS, INC. d/b/a RAINBOW COACHES,	)	No. 86-7630
	)	NLRB# 37-CA-1341
Petitioner,	)	
	)	O R D E R
vs.	)	
	)	F I L E D
NATIONAL LABOR RELATIONS BOARD,	)	FEB - 2, 1988
	)	CATHY A. CATTERSON, CLERK
Respondent.	)	
	)	U.S. COURT OF APPEALS
	)	

Before: BROWNING, Chief Judge, WRIGHT and Leavy, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Browning and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

HAVE YOU BEEN OFFERED REINSTATEMENT BY THE DISCHARGING EMPLOYER? __
YES /X/ NO /__/

NATIONAL LABOR RELATIONS BOARD
COMPLIANCE FORM C/9
REGION 20 (CLAIMANT'S BACKPAY DATA FORM)

CURRENT ADDRESS, IF DIFFERENT
37-CA-1341, 1342, 1387 _____
(Date)
_____ Phone:_____
_____ Zip_____

Miles Fonseca
47-497 Ahulimanu Place
Kaneohe, Hawaii 96744

Rate you were paid before the discrimination against you: $6.30 per HR + tips

Your classification at the time of the discrimination: Tour Driver

COMPLETE THE FOLLOWING FOR THE MONTH OF FEB 1977

A. Employers you worked for this month:
1. Name: _____
From:_____ To:_____
Address: Street Address_____
City:_____ State_____
Zip_____
Earnings: $_____No. hours worked:_____

2. Name: _____
From:_____ To:_____
Address: Street Address_____
City:_____ State_____
Zip_____
Earnings: $_____No. hours worked:_____

(If there were others, attach separate sheet)

B. For all periods you were unemployed this month complete the back of form.

C. List your expenses in searching for work or expenses required to work for employers listed above:

1. Number of driving miles searching for work:_____

2. Long distance telephone calls: $_____

3. Employment agency or union registration fees: $_____

4. Other $_____ for _____

D. List dates you were not available for work this month:

1. From _____to_____; Reason_____
2. From _____to_____; Reason_____
3. From _____to_____; Reason_____

IF YOU ARE UNEMPLOYED COMPLETE OTHER SIDE OF FORM

HAVE YOU BEEN OFFERED REINSTATEMENT BY THE DISCHARGING EMPLOYER? __
YES /X/ NO /_/

NATIONAL LABOR RELATIONS BOARD
COMPLIANCE FORM C/9
REGION 20 (CLAIMANT'S BACKPAY DATA FORM)

CURRENT ADDRESS, IF DIFFERENT
37-CA-1341, 1342, 1387 _____
(Date)
_____ Phone:_____
_____ Zip_____

Miles Fonseca
47-497 Ahulimanu Place
Kaneohe, Hawaii 96744

Rate you were paid before the discrimination against you: $6.30 per HR + tips

Your classification at the time of the discrimination: Tour Driver

COMPLETE THE FOLLOWING FOR THE MONTH OF MAR 1977

A. Employers you worked for this month:
1. Name: _____
From:_____ To:_____
Address: Street Address_____
City:_____ State_____
Zip_____
Earnings: $_____No. hours worked:_____

2. Name: _____
From:_____ To:_____
Address: Street Address_____
City:_____ State_____
Zip_____
Earnings: $_____No. hours worked:_____

(If there were others, attach separate sheet)

B. For all periods you were unemployed this month complete the back of form.

C. List your expenses in searching for work or expenses required to work for employers listed above:

1. Number of driving miles searching for work:_____

2. Long distance telephone calls: $_____

3. Employment agency or union registration fees: $_____

4. Other $_____ for _____

D. List dates you were not available for work this month:

1. From _____to_____; Reason_____
2. From _____to_____; Reason_____
3. From _____to_____; Reason_____

IF YOU ARE UNEMPLOYED COMPLETE OTHER SIDE OF FORM

E. You must list all places where you applied for employment during the month shown on the front of this sheet.

1. Name: _____
   Address _____
   City_____
   Date Applied:_____
   Enter code below 1/ _____

2. Name: _____
   Address _____
   City_____
   Date Applied:_____
   Enter code below 1/ _____

3. Name: _____
   Address _____
   City_____
   Date Applied:_____
   Enter code below 1/ _____

4. Name: _____
   Address _____
   City_____
   Date Applied:_____
   Enter code below 1/ _____

5. Name: _____
   Address _____
   City_____
   Date Applied:_____
   Enter code below 1/ _____

(Add the rest on a separate attached sheet)

F. List employment agencies and union hiring facilities where you registered:

1. Name: _____
   Address _____
   City_____
   Date registered:_____
   Number of referrals to jobs:____

2. Name: _____
   Address _____
   City_____
   Date registered:_____
   Number of referrals to jobs:____

1/ Code:

A - Personal visit (no written application)
B - Personal visit (was interviewed)
C - Personal visit (left written application)
D - Mailed a letter or written application
E - Spoke on telephone (name of person reached must be furnished)
F - Other (explain on an attached sheet)

YOU MUST ATTACH RECEIPTS FOR ALL CLAIMED EXPENSES EXCEPT MILEAGE OR PUBLIC TRANSPORTATION

reverse C-4

NATIONAL LABOR RELATIONS BOARD
REGION 20

COMPLIANCE FORM C/10
(CLAIMANT'S BACKPAY DATA FORM)

CURRENT ADDRESS, IF DIFFERENT_____
(Date)

_____ Phone:_____

_____ Zip_____

HAVE YOU BEEN OFFERED REINSTATEMENT BY THE DISCHARGING EMPLOYER?

YES /__/ NO /X/

COMPLETE THE FOLLOWING FOR QUARTER: APR 1977 thru JUN 1977

A. Employer(s) you worked for this quarter:

1) Name: Charley's Tours From 1st To 31st of June
Address: Street address 1682 Kalakaua Ave.
City Hon. State Hawaii Zip 96826

		Rate	Underline One
Total STRAIGHT-TIME Earnings	$192.50	$3.50	per[hour, day, week, month]
Total OVERTIME Earnings.....	$_____	$____	per[hour, day, week, month]

2) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

		Rate	Underline One
Total STRAIGHT-TIME Earnings	$_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....	$_____	$____	per[hour, day, week, month]

3) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

	Rate	Underline One
Total STRAIGHT-TIME Earnings $_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....$_____	$____	per[hour, day, week, month]

(If there were others, attach a separate sheet)

B. List your expenses in searching for work or expenses required to work for employers listed above:

1. Number of driving miles searching for work and/or extra mileage necessary to commute to interim employment: _____

2. Long distance telephone calls: $_____

3. Out of town meals or lodging: $_____

4. Employment agency or union registration fees: $_____

5. Parking: $_____

6. Other: $_____ for _____

C. List any medical expenses for health insurance expenses which you would not have had if you were still working for your former employer: $_____ (attach a separate sheet)

YOU MUST KEEP RECEIPTS FOR ALL CLAIMED EXPENSES
EXCEPT MILEAGE AND PUBLIC TRANSPORTATION

App. 490

D. List dates you were not available to work this quarter: (For example, because of illness, vacations, jail, military service, strike duty, etc.)

1. From _____ to_____; Reason _____
2. From _____ to_____; Reason _____
3. From _____ to_____; Reason _____

FOR ALL PERIODS YOU WERE UNEMPLOYED THIS QUARTER
COMPLETE THE OTHER SIDE OF THIS FORM

NATIONAL LABOR RELATIONS BOARD
REGION 20

COMPLIANCE FORM C/10
(CLAIMANT'S BACKPAY DATA FORM)

CURRENT ADDRESS, IF DIFFERENT_____
(Date)

_____ Phone:_____

_____ Zip_____

App. 491

HAVE YOU BEEN OFFERED REINSTATEMENT BY THE DISCHARGING EMPLOYER?

YES /__/ NO /X/

COMPLETE THE FOLLOWING FOR QUARTER: JUL 1977 thru SEP 1977

A. Employer(s) you worked for this quarter:

1) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

		Rate	Underline One
Total STRAIGHT-TIME Earnings	$_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....	$_____	$____	per[hour, day, week, month]

2) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

		Rate	Underline One
Total STRAIGHT-TIME Earnings	$_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....	$_____	$____	per[hour, day, week, month]

3) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

	Rate	Underline One
Total STRAIGHT-TIME Earnings $_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....$_____	$____	per[hour, day, week, month]

(If there were others, attach a separate sheet)

B. List your expenses in searching for work or expenses required to work for employers listed above:

1. Number of driving miles searching for work and/or extra mileage necessary to commute to interim employment: _____

2. Long distance telephone calls: $_____

3. Out of town meals or lodging: $_____

4. Employment agency or union registration fees: $_____

5. Parking: $_____

6. Other: $_____ for _____

C. List any medical expenses for health insurance expenses which you would not have had if you were still working for your former employer: $_____ (attach a separate sheet)

YOU MUST KEEP RECEIPTS FOR ALL CLAIMED EXPENSES
EXCEPT MILEAGE AND PUBLIC TRANSPORTATION

D. List dates you were not available to work this quarter: (For example, because of illness, vacations, jail, military service, strike duty, etc.)

1. From _____ to_____; Reason _____
2. From _____ to_____; Reason _____
3. From _____ to_____; Reason _____

FOR ALL PERIODS YOU WERE UNEMPLOYED THIS QUARTER
COMPLETE THE OTHER SIDE OF THIS FORM

E. You must list all places where you applied for employment during this quarter:

1. Name: Charley's — Date Applied: No Work
   Address: _____ — Enter code below:[1/] Available

   Very Slow Period

2. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below:[1/] _____
   City: _____

3. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below:[1/] _____
   City: _____

4. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below:[1/] _____
   City: _____

5. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below:[1/] _____
   City: _____

(Add the rest on a separate attached sheet)

F. List all state, private and union employment services where you registered for work this quarter:

1. Name: _____ Dates registered or visisted: _____
   Address: _____ Were you referred for work? _____
   City: _____ If so, when and where? _____
   _____
   _____
   _____
   _____

2. Name: _____ Dates registered or visisted: _____
   Address: _____ Were you referred for work? _____
   City: _____ If so, when and where? _____
   _____
   _____
   _____
   _____

1/ Code:

A - Personal visit (no written application)
B - Personal visit (was interviewed)
C - Personal visit (left written application)
D - Mailed a letter or written application
E - Spoke on telephone (name of person reached must be furnished)
F - Other (explain on an attached sheet)

NATIONAL LABOR RELATIONS BOARD
REGION 20

COMPLIANCE FORM C/10
(CLAIMANT'S BACKPAY DATA FORM)

CURRENT ADDRESS, IF DIFFERENT_____
(Date)

_____ Phone:_____

_____ Zip_____

App. 498

HAVE YOU BEEN OFFERED REINSTATEMENT BY THE DISCHARGING EMPLOYER?

YES /_/ NO /X/

COMPLETE THE FOLLOWING FOR QUARTER: OCT 1977 thru DEC 1977

A. Employer(s) you worked for this quarter:

1) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

Total STRAIGHT-TIME Earnings $_____ Rate $____ Underline One per[hour, day, week, month]

Total OVERTIME Earnings.....$_____ $____ per[hour, day, week, month]

2) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

	Rate	Underline One
Total STRAIGHT-TIME Earnings $_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....$_____	$____	per[hour, day, week, month]

3) Name: _____ From _____ To _____
Address: Street address _____
City _____ State _____ Zip _____

	Rate	Underline One
Total STRAIGHT-TIME Earnings $_____	$____	per[hour, day, week, month]
Total OVERTIME Earnings.....$_____	$____	per[hour, day, week, month]

(If there were others, attach a separate sheet)

B. List your expenses in searching for work ore expenses required to work for employers listed above:

1. Number of driving miles searching for work and/or extra mileage necessary to commute to interim employment: _____

2. Long distance telephone calls: $_____

3. Out of town meals or lodging: $_____

4. Employment agency or union registration fees: $_____

5. Parking: $_____

6. Other: $_____ for _____

C. List any medical expenses for health insurance expenses which you would not have had if you were still working for your former employer: $_____ (attach a separate sheet)

YOU MUST KEEP RECEIPTS FOR ALL CLAIMED EXPENSES EXCEPT MILEAGE AND PUBLIC TRANSPORTATION

D. List dates you were not available to work this quarter: (For example, because of illness, vacations, jail, military service, strike duty, etc.)

1. From _____ to_____; Reason _____
2. From _____ to_____; Reason _____
3. From _____ to_____; Reason _____

FOR ALL PERIODS YOU WERE UNEMPLOYED THIS QUARTER
COMPLETE THE OTHER SIDE OF THIS FORM

App. 501

E. You must list all places where you applied for employment during this quarter:

1. Name: Charley's — Date Applied: No Work
   Address: _____ — Enter code below: 1/ Available

Slow Period

2. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below: 1/ _____
   City: _____

3. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below: 1/ _____
   City: _____

4. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below: 1/ _____
   City: _____

5. Name: _____ — Date Applied: _____
   Address: _____ — Enter code below: 1/ _____
   City: _____

(Add the rest on a separate attached sheet)

F. List all state, private and union employment services where you registered for work this quarter:

1. Name: _____ Dates registered or visisted: _____
   Address: _____ Were you referred for work? _____
   City: _____ If so, when and where? _____
   _____
   _____
   _____
   _____

2. Name: _____ Dates registered or visisted: _____
   Address: _____ Were you referred for work? _____
   City: _____ If so, when and where? _____
   _____
   _____
   _____
   _____

1/ Code:

A - Personal visit (no written application)
B - Personal visit (was interviewed)
C - Personal visit (left written application)
D - Mailed a letter or written application
E - Spoke on telephone (name of person reached must be furnished)
F - Other (explain on an attached sheet)

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law ....

Article 6, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act 29 USC §161(1).

For the purpose of all hearings and investigations, which, in the

opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title -

(1) Documentary evidence; summoning witnesses and taking testimony

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses

or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under this control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may

administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

National Labor Relations Board Regulations 29 C.F.R. §102.66(C).

Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a

subpoena, whether ad testificandum or duces tecum, if he does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. Such petition shall be filed with the regional director who may either rules [sic] upon it or refer it for ruling to the hearing officer: Provided, however, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The

regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party

aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

HAWAII REVISED STATUTES

Hawaii Revised Statutes ("HRS") §383-95 [Disclosure of Information/Unemployment Insurance].

(a) Except as otherwise provided in this chapter, information obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's

identity. Any claimant (or the claimant's legal representative) shall be supplied with information from the records of the department to the extent necessary for the proper presentation of the claimant's claim in any proceeding under this chapter. Subject to such restrictions as the director may by regulation prescribe, the information and determinations may be made available to:

(1) Any federal or state agency charged with the administration of an unemployment compensation law or the maintenance of a system of public employment offices,

(2) The bureau of internal revenue of the United States Department of Treasury,

(3) Any federal, state or municipal agency charged with the administration of a fair employment practice or anti-discrimination law, and

(4) Any other federal, state or municipal agency if the director deems that the disclosure to the agency serves the public interest.

(b) Information obtained in connection with the administration of the employment service may be made available to persons or agencies for purposes appropriate to the operation of a public employment service.

(c) Upon requests therefor the department shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, and may furnish to any state agency similarly charged, the name, address, ordinary occupation and employment status of each recipient of benefits and the recipient's rights to further benefits under this chapter.

(d) The department may request the comptroller of the currency of the United States to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to this chapter, and may in connection with the request transmit any of the report or return to the comptroller of the

currency of the United States as provided in section 3305(c) of the federal Internal Revenue Code.[1]

§383-30 Disqualification for benefits. An individual shall be disqualified for benefits:

(1) Voluntary separation. For any week prior to October 1, 1989, in which the individual has left work voluntarily without good cause, and continuing until the individual has, subsequent to the week in which the voluntary separation occurred, been employed for at least five consecutive weeks of employment. For the purposes of this paragraph, "weeks of employment" means

all those weeks within each of which the individual has performed services in employment for not less than two days or four hours per week, for one or more employers, whether or not such employers are subject to this chapter. For any week beginning on and after October 1, 1989, in which the individual has left the individual's work voluntarily without good cause, and continuing until the individual has, subsequent to the week in which the voluntary separation occurred, been paid wages in covered employment equal to

not less than five times the individual's weekly benefit amount as determined under section 383-22(b).

An owner-employee of a corporation who brings about the owner-employee's unemployment by divesting ownership, leasing the business interest, terminating the business, or by other similar actions where the owner-employee is the party initiating termination of the employment relationship, has voluntarily left employment.

(2) Discharge or suspension for misconduct. For any week prior to October 1, 1989, in

which the individual has been discharged for misconduct connected with work, and continuing until the individual has, subsequent to the week in which the discharge occurred, been employed for at least five consecutive weeks of employment. For the week in which the individual has been suspended for misconduct connected with work and for not less than one or more than four consecutive weeks of unemployment which immediately follow such week, as determined in each case in accordance with the seriousness of the

misconduct. For the purposes of this paragraph, "weeks of employment" means all those weeks within each of which the individual has performed services in employment for not less than two days or four hours per week, for one or more employers, whether or not such employers are subject to this chapter. For any week beginning on and after October 1, 1989, in which the individual has been discharged for misconduct connected with work, and until the individual has, subsequent to the week in which the discharge occurred, been paid wages in covered

employment equal to not less than five times the individual's weekly benefit amount as determined under section 383-22(b).

(3) Failure to apply for work, etc. For any week prior to October 1, 1989, in which the individual failed, without good cause, either to apply for available, suitable work when so directed by the employment office or any duly authorized representative of the department of labor and industrial relations, or to accept suitable work when offered and continuing until the individual has, subsequent to the week in

which the failure occurred, been employed for at least five consecutive weeks of employment. For the purposes of this paragraph, "weeks of employment" means all those weeks within each of which the individual has performed services in employment for not less than two days or four hours per week, for one or more employers, whether or not such employers are subject to this chapter. For any week beginning on and after October 1, 1989, in which the individual failed, without good cause, either to apply for available, suitable work when so directed by the

employment office or any duly authorized representative of the department of labor and industrial relations, or to accept suitable work when offered until the individual has, subsequent to the week in which the failure occurred, been paid wages in covered employment equal to not less than five times the individual's weekly benefit amount as determined under section 383-22(b).

(A) In determining whether or not any work is suitable for an individual there shall be considered among other factors and in

addition to those enumerated in paragraph (3)(B), the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness and prior training, the individual's experience and prior earnings, the length of unemployment, the individual's prospects for obtaining work in the individual's customary occupation, the distance of available work from the individual's residence, and prospects for

obtaining local work. The same factors so far as applicable shall be considered in determining the existence of good cause for an individual's voluntarily leaving work under paragraph (1).

(B) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(i) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(iii) If as a condition of being employed the individual would be required to join a company

union or to resign from or refrain from joining any bona fide labor organization.

(4) Labor dispute. For any week with respect to which it is found that unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which the individual is or was last employed; provided that this paragraph shall not apply if it is shown that:

(A) The individual is not participating in or directly interested in

the labor dispute which caused the stoppage of work; and

(B) The individual does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; provided that if in any case separate branches of work, which are commonly conducted in separate

businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this paragraph, be deemed to be a separate factor, establishment, or other premises.

(5) If the department finds that the individual has within the twenty-four calendar months immediately preceding any week of unemployment made a false statement or representation of a material fact knowing it to be false or knowingly failed to disclose a material fact to

obtain any benefits not due under this chapter, the individual shall be disqualified for benefits beginning with the week in which the department makes the determination and for each consecutive week during the current and subsequent twenty-four calendar months immediately following such determination, and such individual shall not be entitled to any benefit under this chapter for the duration of such period; provided that no disqualification shall be imposed if proceedings have been undertaken against the

individual under section 383-141.

(6) Other unemployment benefits. For any week or part of a week with respect to which the individual has received or is seeking unemployment benefits under any other employment security law, but this paragraph shall not apply (A) if the appropriate agency finally determines that the individual is not entitled to benefits under such other law, or (B) if benefits are payable to the individual under an act of Congress which has as its purpose the supplementation

of unemployment benefits under a state law.[2]

Hawaii Dept. of Labor and Industrial Relations Administrative Rules

§12-5-55 Failure to apply for work.

(a) A claimant shall be disqualified under section 383-30(3), Hawaii Revised Statutes, if:

(1) The claimant was offered employment or was directed to apply for employment by a public employment office;

(2) The prospective employment was suitable;

(3) The offer was refused or the claimant failed to apply; and

(4) The refusal or failure to apply was without good cause.

(b) An offer of work or referral to employment shall be considered properly made when:

(1) A job opening actually existed at the time the offer was made or referral was given;

(2) The claimant knew and understood that an offer or referral was being made;

(3) The claimant was given sufficient information concerning the conditions of the job such as, but not limited to, the duties, location of work, hours of work, wages, working conditions, equipment needed, and union requirements if any, to determine the

suitability of the offer or the referral; and

(4) The claimant upon accepting a referral was given adequate information as to where and how to apply.

(c) Suitable work means work in the individual's usual occupation or work for which the individual is reasonably fitted. In determining whether an individual is reasonably fitted for a particular job, the department shall, among other factors, consider:

(1) The degree of risk involved to the claimant's health, safety, and morals;

(2) The claimant's physical fitness;

(3) The claimant's prior training;

(4) The claimant's experience;

(5) The claimant's prior earnings;

(6) The length of the claimant's unemployment;

(7) The claimant's prospects for obtaining work in such claimant's customary occupation;

(8) The distance of available work from the claimant's residence; and

(9) The claimant's prospects for obtaining local work.

(d) Notwithstanding any other provisions in this section, no work shall be deemed suitable and benefits shall not be denied under section 383-30(3), Hawaii Revised Statutes, to any otherwise eligible individual for refusing to accept new work under any

of the conditions specified in section 383-30(3)(B), Hawaii Revised Statutes.

(e) Failure to apply for work includes, but is not limited to:

(1) Failure to report to a public employment office on a call-in for a referral to work; or

(2) A refusal to accept a referral to work; or

(3) After acceptance of the referral, a refusal to apply to the employer for work.

(f) Refusal of work offer includes, but is not limited to:

(1) Refusal of a job offer made by an employer or by someone having authority to hire for the employer; or

(2) After acceptance of a job offer made by an employer, claimant's failure to report to work for that employer on the first scheduled day of work.

FOOTNOTES

[1] The statute in force at the time of the Board's decision did not differ materially from the statute above cited. The term "his" was used in place of "the claimant's" appearing in lines 10 and 14 of the statute. Subparagraphs (1)-(4) did not begin with capital letters. See ALJ backpay decision, p. 10 (n.1) App. _____.

[2] The present unemployment statute above cited does not differ materially from the statute in effect during the backpay proceedings.

Supreme Court, U.S.
FILED
JUN 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1795

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAINBOW TOURS, INC., D/B/A RAINBOW COACHES,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined the backpay due employees whom petitioner had discharged unlawfully.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	7
Canova v. *NLRB*, 708 F.2d 1498 (9th Cir. 1983)	7
Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982)	9
General Engineering, Inc. v. *NLRB*, 341 F.2d 367 (9th Cir. 1965)	7
Hacienda Hotel, 279 N.L.R.B. No. 84 (Apr. 28, 1986), enforced mem., 813 F.2d 1230 (9th Cir. 1987)	8
Herman Bros. Pet Supply v. *NLRB*, 360 F.2d 176 (6th Cir. 1966)	7
Liberty Scrap Materials, Inc., 152 N.L.R.B. 480 (1965), enforced, 64 L.R.R.M. (BNA) 2686 (6th Cir. 1967)	8
Louton, Inc., 281 N.L.R.B. No. 154 (Sept. 30, 1986), enforced, 822 F.2d 412 (3d Cir. 1987)	8
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)	9
NLRB v. *Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971)	6
Southern S.S. Co. v. *NLRB*, 316 U.S. 31 (1942)	8
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984)	8
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982)	7, 9

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause)	6
Civil Rights Act of 1964, Tit. VII, § 706(g), 42 U.S.C. 2000e-5(g)	9
National Labor Relations Act § 8(a)(1), 29 U.S.C. 158(a)(1)	3

Constitution, statutes and regulation – Continued: Page

12 U.S.C. 3308 4

26 U.S.C. (& Supp. IV) 6601-6602 8

26 U.S.C. (& Supp. IV) 7201-7207 8

26 U.S.C. (& Supp. IV) 7601-7655 8

Haw. Rev. Stat. § 383-95(a) (1985) 4

29 C.F.R.:

Section 102.30 6

Section 102.31(b) 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1795

RAINBOW TOURS, INC., D/B/A RAINBOW COACHES,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 835 F.2d 1436 (Table). The supplemental decision and order of the National Labor Relations Board (Pet. App. 34-37), together with the findings and recommendations of the administrative law judge (Pet. App. 38-363), are reported at 280 N.L.R.B. No. 17. The Board's decision and order in the underlying unfair labor practice proceeding (Pet. App. 364-454) are reported at 241 N.L.R.B. 589; the court of appeals enforced that order in an unpublished decision reported at 628 F.2d 1357 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 456-478) was entered on February 18, 1988, following the

court's earlier denial of a petition for rehearing and suggestion for rehearing en banc on February 2, 1988 (Pet. App. 479-480). The petition for a writ of certiorari was filed on April 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioner, Rainbow Tours, Inc., operates a tour bus service in Honolulu, Hawaii. On January 29, 1977, members of the Teamsters union[1] began picketing outside petitioner's yard (Pet. App. 389). A group of petitioner's bus drivers decided to respect the Teamsters' picket line (*id.* at 400). Petitioner told these employees that they would be fired if they did not return to work. Petitioner also told the employees that, if they returned to work, they would "go to the bottom of the seniority roster" (*id.* at 403).[2] The striking employees refused petitioner's offer and on January 31 petitioner discharged 12 of its bus drivers (*id.* at 404). Several days later the drivers applied for reinstatement. Petitioner told them that "there were no full-time openings, but [petitioner] would accept their applications for part-time employment as and when needed" (*id.* at 406). Petitioner eventually rehired a number of the striking employees (*id.* at 406-414).[3]

---

[1] The pickets belonged to the Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pet. App. 372).

[2] Petitioner further informed the employees that, should they seek union representation, any union other than the Teamsters would be acceptable (Pet. App. 404).

[3] Petitioner did not rehire eight of the striking employees. Two of the employees for whom backpay is at issue, Fonseca and Louis, were ultimately reinstated to positions not substantially equivalent to those they previously filled. Pet. App. 191-193, 200, 293.

The Board, upholding the decision of the administrative law judge (ALJ), concluded that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging the 12 employees for refusing to cross the picket line. The Board found that petitioner had not made a valid reinstatement offer to the employees on either January 31 or February 2. The Board thus ordered petitioner to offer the employees reinstatement with backpay. Pet. App. 418 & n.38, 431-433, 443.

The court of appeals enforced the Board's order without opinion (Pet. App. 455).

2. On September 30, 1982, the Board's General Counsel issued a backpay specification alleging that 10 of the 12 discriminatees were entitled to backpay in amounts totalling approximately $148,000 plus interest (Pet. App. 2, 24). The specification set forth, for each discriminatee, the gross amount of backpay alleged to be due for each calendar quarter in the backpay period,[4] the interim earnings that the discriminatee had received in each quarter, and the net backpay claimed for each quarter (the difference between the gross backpay and the interim earnings for the quarter). Petitioner filed an answer that denied most of the allegations in the backpay specification and raised several affirmative defenses. The General Counsel filed a motion for partial summary judgment, which the Board granted in part and denied in part. The Board remanded the case for a hearing. *Id.* at 23-33.[5]

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[4] The backpay period began on February 1, 1977, the day after the unlawful discharges, and ended in October 1980, when petitioner made valid offers of reinstatement to the discriminatees.

[5] The Board granted summary judgment with respect to the gross backpay of four discriminatees (Pet. App. 31). Petitioner does not challenge this ruling.

In preparation for the hearing, petitioner subpoenaed several banks for the records of any accounts held by the discriminatees. Some of the banks produced such records. Pet. App. 85-86. Petitioner also subpoenaed the Unemployment Insurance Office of the Hawaii Department of Labor and Industrial Relations (Department) for records relating to the discriminatees. The Department, invoking a state statute,[6] refused to produce any records. *Id.* at 75-76.

The ALJ held a lengthy hearing, during which petitioner presented witnesses and questioned each discriminatee about interim earnings and other relevant issues. At the outset, the ALJ, upon the Department's petition, revoked petitioner's subpoena on the ground that the state statute prohibited disclosure and petitioner had "failed to state with specificity any reason that the [Department's] claim of confidentiality and privilege should not be honored under the circumstances of this case" (Pet. App. 80). The ALJ, early in the hearing, also refused to order the banks to comply with the subpoenas until petitioner established "the relevance and materiality of the subpoenaed records" (*id.* at 88).[7] Petitioner initially failed to make such a show-

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[6] Haw. Rev. Stat. § 383-95(a) (1985) provides in pertinent part:

> [I]nformation obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity.

[7] Certain banks had refused to comply with petitioner's subpoenas unless the banks received a "certificate of compliance" under 12 U.S.C. 3308. The General Counsel refused to sign the certificate, as required by statute, in part because "there was no reasonable cause to believe the records were sought for law enforcement purposes" (Pet. App. 87).

ing. Despite the ALJ's expressed willingness to reconsider her ruling, petitioner during the hearing "failed to describe with specificity those accounts in banks which failed to comply with the subpoena in a manner which would permit a finding of potential relevance" (*id.* at 94).

The ALJ made extensive factual findings with respect to each discriminatee, concluding that the backpay of four discriminatees should be reduced because they were unavailable for work or incurred willful losses of earnings during portions of the backpay period (Pet. App. 164-331). She further found that none of the discriminatees had willfully concealed interim earnings from the Board (*id.* at 139-148). Although calling "reprehensible" one discriminatee's failure to report earnings on his income tax returns, the ALJ concluded that this was "not the type of concealment that would toll backpay" (*id.* at 210). The ALJ recommended that the Board order petitioner to pay the discriminatees specified amounts totaling over $90,000 plus interest (*id.* at 333, 345-363).

The Board affirmed the ALJ's rulings, findings, and conclusions and adopted her recommended order (Pet. App. 34-37).

3. The court of appeals affirmed the Board's decision and enforced its order with a modification as to one discriminatee (Pet. App. 1-22).[8] The court concluded that the ALJ had not abused her discretion in denying petitioner's request for pretrial discovery where petitioner "failed to specify the information it sought * * * or the prejudicial effect of being denied discovery" (*id.* at 8). The

[8] The Board conceded in the court of appeals that the backpay award of one discriminatee should be reduced by approximately $1,300. The Court modified the Board's order accordingly (Pet. App. 22, 472-473). Petitioner does challenge this modification.

court further concluded that the ALJ had properly refused to enforce the bank subpoenas where petitioner failed to "establish relevancy" and had not shown an inability to "obtain [the subpoenaed] records by other means" (*id.* at 12). Similarly, the court held that the ALJ had properly revoked the subpoena to the Department on the basis of the state statutory privilege and concluded that petitioner's claim of prejudice was "unsubstantiated" (*id.* at 11).[9]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 13-18) that the Board's denial of its request for pretrial depositions and the Board's refusal to enforce its subpoenas amounted to a violation of the Due Process Clause. This contention is meritless. The Board's rules and regulations provide for pretrial depositions only upon a showing of good cause. 29 C.F.R. 102.30; see *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). Petitioner, however, never made such a showing. The court of appeals thus correctly concluded that the Board had not abused its discretion in denying petitioner's request because petitioner "failed to specify the information it sought through discovery or the prejudicial effect of being denied discovery" (Pet. App. 8).

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[9] The court did not address petitioner's argument that "backpay must be tolled by its offer of employment with reduced seniority since the offer constitutes substantially equivalent employment" because there was no "finding that [petitioner] offered to reinstate discriminatees to substantially equivalent positions" (Pet. App. 18-19).

The Board's rules and regulations also provide that a subpoena may be revoked on the ground that the information sought is irrelevant or "for any other reason sufficient in law" (29 C.F.R. 102.31(b)). With respect to the bank subpoenas, petitioner failed to provide a "description of the accounts or a showing as to [their] nature" and thus never established the relevance of the subpoenaed bank records (Pet. App. 11).[10] With respect to the subpoena issued to the Hawaii Unemployment Insurance Office, the Board exercised its sound discretion to respect the state policy of maintaining the confidentiality of employment-related information disclosed to the state agency. See, *e.g.*, *Canova* v. *NLRB*, 708 F.2d 1498, 1502-1503 (9th Cir. 1983); *Herman Bros. Pet Supply* v. *NLRB*, 360 F.2d 176, 178-180 (6th Cir. 1966).[11] Accordingly, the Board correctly refused to enforce these subpoenas.

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[10] Petitioner may not claim any prejudice from the Board's refusal to enforce the bank subpoenas because, as the court of appeals noted, petitioner could have obtained the information sought by enforcing the subpoenas served on the discriminatees themselves. See Pet. App. 12-13.

Petitioner's contention (Pet. 16) that the decision below conflicts with *General Engineering, Inc.* v. *NLRB*, 341 F.2d 367 (9th Cir. 1965), is wrong. The latter decision explicitly recognized that the Board could require a "showing of general relevance and reasonable scope of the evidence sought" (*id.* at 376 (footnote omitted)).

[11] Petitioner also contends (Pet. 17-18) that the Board should have enforced the subpoena because the "state statutory privilege * * * is * * * preempted by the [National Labor Relations Act]" (*id.* at 17). Petitioner did not raise this argument before either the Board or the court of appeals and thus has not preserved the issue for review. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 664 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the issue is not whether the Board could override the state

2. Petitioner also contends (Pet. 18-20) that the Board should have reduced the backpay of one discriminatee, Miles Fonseca, who disclosed his interim earnings to the Board, because he failed to report them to the Internal Revenue Service (IRS). Courts have approved the Board's consistent practice of declining to penalize discriminatees who fully report earnings to the Board, but fail to do so to other federal or state authorities. See *Hacienda Hotel*, 279 N.L.R.B. No. 84 (Apr. 28, 1986) (failure to report tips to IRS), enforced mem., 813 F.2d 1230 (9th Cir. 1987); *Louton, Inc.*, 281 N.L.R.B. No. 154 (Sept. 30, 1986) (same), enforced, 822 F.2d 412 (3d Cir. 1987); *Liberty Scrap Materials, Inc.*, 152 N.L.R.B. 480 (1965) (failure to report interim earnings to state unemployment agency), enforced, 64 L.R.R.M. (BNA) 2686 (6th Cir. 1967). Contrary to petitioner's assertion (Pet. 19), the Board's practice does not encourage tax evasion. The employee who conceals income from the IRS subjects himself to civil and criminal penalties. See 26 U.S.C. (& Supp. IV) 6601-6602, 7201-7207, 7601-7655.[12] Under the circumstances, the court of appeals correctly enforced the Board's decision.

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statute. Under its regulations, 29 C.F.R. 102.31(b), the Board exercises its discretion in each case to decide whether to respect a particular state confidentiality provision; the only issue is whether it reasonably exercised that discretion here.

[12] Petitioner's reliance (Pet. 20) on cases such as *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), and *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942), is misplaced. In those decisions this Court held that certain practices by the Board would improperly undermine enforcement of other federal statutes. Here, by awarding backpay to a discriminatee who failed to report income to the IRS, the Board in effect declined to impose an additional nontax penalty on the failure to report income. By this action, the Board did not either weaken or interfere with enforcement of the federal income tax statutes.

3. Finally, petitioner contends (Pet. 20-22) that, under *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982), an offer to reinstate unlawfully discharged employees to positions without accrued seniority tolls backpay. Petitioner has failed to preserve this issue for review by not raising it before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). Moreover, this issue is not presented by the record. The Board did not find that petitioner offered the striking employees reinstatement conditioned only on loss of seniority. Instead, the Board found that petitioner's offer was " 'ambiguous at best,' " that petitioner offered to rehire only two employees, and that petitioner had not reinstated those two employees to substantially equivalent positions (Pet. App. 19, 418 n.38).

In any event, *Ford Motor Co.* v. *EEOC*, *supra*, does not govern the situation presented. In that case, this Court held that, under Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), an employer's offer of employment, without retroactive seniority, to job applicants who were allegedly discriminated against in hiring, "ends the accrual of potential backpay liability" (458 U.S. at 241). The Court, in reaching this conclusion, expressed concern (*id.* at 240) that requiring the employer to grant fictional seniority to new employees who had not yet proven, and might never prove, unlawful discrimination would cause unwarranted layoffs and other harm to innocent employees. In contrast, the Board's order requiring the employer to reinstate unlawfully discharged employees to positions with accrued seniority, the case at hand, would frustrate no legitimate expectations of less senior employees. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 231 (1963) (unlawful to grant striker replacements and nonstriking employees superseniority over returning strikers).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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